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No. 2639.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Petition of Defendant in Error for Rehearing
and Modification of Opinion.

Filed

MAR 20 1916

DEVLIN & DEVLIN, **F. D. Monckton,**
W. H. CARLIN, **Clerk,**
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Filed this *day of* 1916.

FRANK D. MONCKTON, Clerk.

By *Deputy Clerk.*

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable William B. Gilbert, Erskine M. Ross and Frank H. Rudkin, Judges of Said Court:

The defendant in error deeming itself to be aggrieved by error in the decision of this court, filed February 21, 1916, and its rights upon a new trial to be prejudiced by said error, respectfully presents the following particulars wherein it conceives such decision to be erroneous and incorrect in law, and respectfully asks for a rehearing upon such grounds, or if the Court be unwilling to grant a rehearing, that its opinion be modified as herein after prayed.

I.

The rule of damages announced by the Court is in conflict with the authorities. No point was made in

the brief or argument that the rule of damages given by the trial judge was erroneous. No exception was taken by the charge on this subject.

If the rule given in the charge by the trial judge and not excepted to is claimed not to be correct, the defendant in error should have the opportunity of arguing the question.

The trial court gave this rule of damages:

“If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period under which delivery may be made under the contract.” (Trans. p. 375.)

And again:

“The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives, is the amount that the injured party suffers by the continued breach down to the time of performance is due, less any abatement by reason of steps by the injured party to protect himself, which the law requires him to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of this loss, between the date of repudiation of the contract and the time in which it had to make complete delivery of the hops, less the amount he would save by reasonably prompt disposition of the hops to others, at the best price to be obtained as hereinafter stated, such damage not to exceed the amount demanded in the complaint, which amount I believe is \$32,000.00.” (Trans. p. 373.)

As stated, no exception was taken to this part of the charge, and no point was made in the briefs or argument that the rule was not correctly stated.

The Circuit Court of Appeals in its opinion states :

“In this case the measure of damages was the difference between the contract price and the market price at *the time and place of delivery*, because there was no allegation in the complaint that the hops were resold, or of the price at which they were resold. In other words, the action was not brought to recover the difference between the contract price and the selling price, with expenses added; but to recover general damages, and the law fixes these at the difference between the contract price and the market price at the time and place of delivery.”

This Court again states :

“The contract in suit was canceled by the Brewing Company on the 4th day of November, 1912, and the complaint alleged a tender of performance which must have been made at or about that time. The only purpose of fixing the date of delivery would be to *fix a date for the ascertainment of the market price*, and under the circumstances of this case that date should be *fixed as of November 4th, 1912, or soon thereafter.*”

This Court in its opinion states that the complaint alleges a tender of performance which it says must have been made at or about the 4th of November, 1912.

In the first paragraph quoted above from this

Court's opinion, the Court correctly states the rules of damages, but in the second paragraph quoted the Court states that the damages are to be fixed, not by the market value at the time of delivery, but by the market value at the time of the renunciation of the contract by the Brewing Company on November 4, 1912, or soon thereafter.

As no point was raised by the plaintiff in error as to the rule of damages, the instructions given by the trial court should remain as the law of the case. The matter was not referred to in our brief because not mentioned by the other side. If it be urged that the instructions given by the trial court are erroneous, we should have the opportunity of arguing the proposition.

By consent of all parties the case was tried on the theory, not that the hops in gross were tendered, but that samples were submitted and the *samples* tendered by plaintiff below were rejected and the defendant below repudiated the contract.

The Court instructed the jury that,

“While this contract did not by its terms, require plaintiff to submit samples of hops prior to delivery, the evidence shows *without conflict* that the parties by their acts so construed it, and it therefore became one of the terms of the contract.” (Trans. p. 360.)

This was in accordance with the allegation of defendant's answer which, after stating that a contract proposed by defendant below was not signed, alleged that,

“Immediately thereafter and in the said month of September, 1911, the defendant in writing informed the plaintiff that defendant’s understanding of any contract between the plaintiff and defendant in relation to the said hops was that shipments and deliveries of said hops should be made by the plaintiff to defendant during the months of *October, November and December of 1912*, and *January and February of 1913*, and that samples of any hops which the plaintiff should offer for delivery to defendant in pursuance of the aforesaid telegraphic offers and acceptances should and must be submitted by plaintiff to defendant and be approved by the defendant *before shipments and deliveries should be made*; that the plaintiff accepted to and agreed to defendant’s interpretation and understanding of the said telegraphic orders and acceptances,” etc. (Trans. p. 20.)

Defendant then alleges that it procured samples which it submitted to plaintiff, and informed plaintiff that it would be willing to accept and purchase two thousand bales of choice Cosumnes hops from the defendant, if the same were in all things equal in quality to the samples submitted. (Trans. p. 29.)

The answer then alleges:

“That the plaintiff never did procure or offer or deliver to the defendant any choice Cosumnes hops or any hops equal in quality to the samples submitted by defendant to plaintiff as aforesaid, and has never at any time delivered or offered to deliver any choice Cosumnes hops of the crop of 1912, *or any hops of the crop of 1912.*” (Trans. pp. 29-30.)

While the complaint alleged that the plaintiff did offer and tender to the defendant two thousand bales of hops, this is not to be understood that the plaintiff segregated two thousand bales of hops and tendered these identical two thousand bales to defendant, but that the contract was a sale by samples. This was the theory of the defendant below, and the case was tried on that theory by consent of both parties. The plaintiff submitted samples in the first place which the defendant rejected. The defendant then submitted samples, saying it would accept hops equal to such samples.

The plaintiff then submitted samples of hops which it claimed were equal to or better than those submitted by defendant, and offered to make delivery if such samples were acceptable.

Defendant then repudiated the contract on November 4th. Plaintiff had, according to defendant's theory, not only the whole month of November, but also December, January and February in which to perform.

Delivery in bulk was not tendered, but delivery by samples was, and the plaintiff below under any phase of the pleadings or evidence had several months after the repudiation of the contract in which to perform. But even if this were not so the case was tried on that theory.

This Court assumes that the hops were tendered on November 4, 1912. The evidence showed that the renunciation of the contract by the Brewing Company excused an actual tender.

The allegation of tender was disregarded by both parties, and the theory upon which the case was tried was that there had been no tender. There was no segregation of the 2000 bales of hops, nor was it claimed that there had been such a segregation.

No different theory was argued in briefs of counsel. If such argument had been made it could not be considered because in the Federal Court, in actions at law, only questions presented by the trial court will be reviewed by an appellate court; and when a cause is tried upon an issue or theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration.

Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23, 106 C. C. A. 220.

In actions at law the function of the Circuit Court of Appeals is exclusively the correction of errors below, and questions which were not presented nor decided by the trial court are not open for review.

Clark v. City of Pittsburg, 146 Fed. 441; affirmed 154 Fed. 464.

Where parties, with the assent of the Court, unite in trying a case on the theory that a certain matter is within the issues, they cannot depart therefrom on appeal.

Missouri K. & T. Ry. Co. v. Wilhoit, 160 Fed. 440.

According to plaintiff's theory it had, if it established the custom it claimed, until the end of the shipping season, and at any event had a reasonable time after November 4th to perform.

Under the contract the plaintiff company had the right to go out in the market and purchase hops equal to the samples submitted by defendant. Plaintiff company was a *dealer* in hops as well as a grower.

The defendant in submitting samples of hops which it would accept did not confine itself to hops grown by plaintiff company, but agreed to accept any hops equal in quality to the samples submitted.

On the question of custom, the only point that could be made was one of fact. No point is made in the brief that the testimony is inadmissible. The only point made in the brief that the custom was proven by only one witness. (See brief plaintiff in error, page 169.)

This then was a question of fact before the jury. But for our present purposes we may omit this evidence altogether. It is plain by defendant's answer that the plaintiff had November, December, January and February for delivery.

The evidence of custom as to time of delivery is mentioned in the brief of Pabst Company (p. 169), only to attack its sufficiency as proof of a binding custom. This, of course, was a question for the jury; but the relevancy of a custom fixing the time of delivery, as determining the time at which to fix value,

is now questioned for the first time in what we submit is an inadvertent and mistaken statement in the opinion of this Court.

2. If this petition of a rehearing be not granted, the theory of the trial court and of both parties to the controversy may be overturned, to the serious prejudice of the Horst Company, without its being given an opportunity to be heard on the question. And we urge upon the Court a reconsideration of the question of damages because, if the intimation to which reference has been made is not merely based on an inadvertent assumption that the hops were tendered on November 4th, it violates well settled rules of law and is in direct conflict with repeated decisions of both Federal and state courts.

The contract in suit was made in 1911 for the sale of hops of the crop of 1912. The Horst Company offered proof of a trade custom which would fix the time of delivery as a period from harvest time in 1912 to March 1st, 1913. The Brewing Company claimed that the contract had been modified so as to allow the delivery from September to December, 1912. In either case the time for delivery had not expired when the Brewing Company cancelled the contract on November 4th, 1912. In any event, the seller would have a reasonable time after the harvesting of the crop, which might have extended beyond the date of the attempted cancellation.

We have therefore a case of an executory contract

of sale, repudiated by the buyer before the time for delivery had expired. If the repudiation was wrongful, our position is

(a) that the seller could claim as damages the difference between the contract price and the market price as of the time specified in the contract for delivery;

(b) that if the contract is silent as to time of delivery, the seller may show that a trade custom fixed the time of delivery; and that in such case, the custom becomes a part of the contract as surely as if the accustomed time had been expressly incorporated therein; and finally,

(c) that if the contract, either expressly or by custom incorporated therein, allows a period of time for delivery, damages are fixed as of the last day of delivery.

3. *The rule of damages announced by the Appellate Court is in conflict with the authorities.*

The proper rule of damages in this case of an anticipatory breach of a contract of sale is stated as follows in Sedgwick on Damages.

“In England and most of the United States, the repudiation of a contract by one of the parties to it before the time for performance has arrived amounts to a tender of a breach of the contract; and if it is accepted as such by the other party it constitutes a so-called ‘anticipatory breach,’ and the injured party is at liberty to begin suit at once and to recover entire damages (citing cases). The damages are to be assessed, of course, as of the date of the breach; nevertheless, they are to be a compensation for

the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time of the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms. The damage caused by such a premature destruction is, to be sure, due to the consequent failure to secure performance; but this is a failure to secure performance according to its original terms, that is, performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract, regarded as an article of property, the measure of damages is the value of such article at the time of its destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, *the exact measure of damages upon an anticipatory breach is in the ordinary case precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought suit, after the time of performance, for the non-performance of the time set.* In other words, though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance.

“Thus in the leading case of *Roper v. Johnson* (L. R. 8 C. P. 167), it appeared that a contract by the defendant to deliver certain goods had been repudiated by him before the time for performance, and that this repudiation had been accepted as a breach by the plaintiff, who brought suit at once. The court held that the measure

of damages was the difference between the contract price and the market value at the time of performance. So in the case of *Roehm v. Horst* (178 U. S. 1), where the purchaser repudiated a contract of sale before the time for delivery and the seller brought suit at once, it was held that the basis of damages in the absence of special circumstances was the cost of performance at the time fixed therefor by the contract." (Sedgwick on Damages, 9th ed., sec. 636 d.)

And the author then proceeds to discuss the evidence of the value at the time for performance, saying:

"Where the trial of the action is not had until after the time fixed by the contract for performance this rule will not result in any uncertainty as to the amount of damages; for market values at the time fixed for performance can be shown, and the amount of damages is therefore no more uncertain than it would have been if suit had been brought after the time fixed for performance. If, however, suit is brought and actually comes to trial before the time fixed for performance, there is an element of uncertainty, because the jury can tell only by conjecture what would be the actual cost of performance at the time set therefor. This, however, should be regarded as no objection to the application of the ordinary rule of damages. It is true that in such a case values at the time of breach, or rather at the time of trial, will be introduced in evidence and will probably form the basis upon which the jury will find the values at the date for performance; but such actual values are introduced in evidence not because values at the time of breach are of any importance in them-

selves, but merely as evidence to prove the probable values at the time of performance.” (Sedgwick on Damages, 9th ed., sec. 636e.)

In the present case the suit was brought, and the trial had, *after* the expiration of the time for performance, and consequently the value at the time of the repudiation on November 4th were not necessary in order to determine the value at the time for delivery. Yet the opinion of the Court, if allowed to stand in its present form, may prevent proof of custom showing when delivery was due, and confine us to the question of value at the time of the breach—a question which is immaterial under the above stated rule.

The leading case on the subject of anticipatory breach, also a case involving a hop contract, under which the buyer was in default, is *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953. There the trial was had before the time for delivery arrived, yet the Supreme Court of the United States said:

“As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party *down to the time of complete performance*, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.”

In direct violation of this rule, the opinion in this case holds that the seller is to be denied his damages “down to the time of complete performance,” and is

to be confined to the damages he would have sustained had delivery been due November 4th, 1912, and had a tender been refused on that day.

In the Roehm case, the market price at the future time of delivery was incapable of ascertainment, and the Court therefore allowed the seller the difference between the contract price and the price at which hops could be resold for delivery at the same future time of delivery. But in the present case, the price at the time of delivery could have been proved and was proved.

Another case involving a sale of hops is *Krebs Hop Co. v. Livesly*, 114 Pac. 948, where the opinion was written by Judge Bean, who is now United States District Judge in Oregon. There also the purchaser had repudiated liability before the time for delivery, and it was held that

“the rule of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery”,

and further that

“notice from the buyer to the seller, before the day of delivery, that he will not receive the property does not affect this rule unless the seller upon receiving such notice should elect to terminate the contract.”

This decision quotes from the case of *Cherry Valley Iron Works v. Florence Iron River Company*, 64 Fed. 569, 575, to which reference is also made in the opin-

ion in the present case, although in another connection. The Cherry Valley case holds that where the property has not been separated from the mines in the seller's possession, and where title has not passed, the measure of damages for the buyer's renunciation of the contract is the difference between the contract price and the market price *at the times when the several installments should have been delivered.*

Skeele Coal Co. v. Arnold, 200 Fed. 393, a case in the second circuit, involved a claim of a seller for damages for the buyer's repudiation of a contract of sale. The contract was to sell 100,000 tons of coal, deliverable in equal monthly installments between April 1, 1909, and April 1, 1910. Early in April, 1909, the buyer repudiated the contract. The Court said:

"The question to be determined is the proper measure of the Meriden Company's damages. As the purpose of the law is compensation, the Meriden Company should be put as far as possible in the same position it would have been in if the contract had been carried out. It could have brought suit to recover its entire damages in May, 1909, when it acquiesced in the Skeele Company's repudiation of the contract. *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. It ought to have disposed of its coal to other parties, it being a single article, at the market price, if that exceeded the cost of production. The measure of damages would then have been the difference between the contract price and the market price for coal *to be delivered in the future under a contract as similar to the*

repudiated contract as it could obtain. However, it elected, as it had a right to do, to bring suit after the term of the contract had expired. At that time it was possible to show the market price of coal for each month of the term of the contract."

The decision of the Circuit Court of Appeals of the Second Circuit in *Skeele Coal Co. v. Arnold* is directly applicable to the facts of the present case. Just as in that case the price to be considered was not that of April, 1909, the date of repudiation, but rather that of the times fixed for the delivery of the coal—so here the damages should be determined not by the value on November 4th, but by the value at the time for delivery, which was fixed as definitely by custom as if the contract had expressly provided for delivery at any time before March 1st, 1913.

The same rule was again applied in *Stephen M. Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770, 783, where the Court quotes with approval the statement that "*the date at which the contract is considered to have been broken is that at which the goods were to have been delivered, and not that at which the buyer may give notice that he intends to break the contract, and to refuse to accept the goods.*" Benjamin on Sales, Sec. 1012.

After thoroughly discussing the question, the Court holds that a seller is entitled to damage as of the time set for performance, even though a repudiation has occurred at an earlier time.

The rule fixing the damages as of the time for delivery (as distinguished from the time of renunciation) was enforced by the Circuit Court of Appeals for the Fifth Circuit in

Southern Oil Co. v. Heflin, 99 Fed. 339;

And also in the following cases :

Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548;
Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436;

Poel v. Brunswick Co., 144 N. Y. Supp. 725;
Lee v. Briggs, 99 Mich. 487, 58 N. W. 477;
Missouri Furnace Co. v. Cochran, 8 Fed. 463;

And is stated to be the settled law in Williston on Sales, Sec. 587. Upon a repudiation before performance, the other contracting party is not bound to buy or sell before the time set for performance, for the purpose of possibly reducing the damages.

York Mercantile Co. v. Lusk, 6 Kan. App. 629,
 49 Pac. 788.

Some of the cases intimate that a different rule might be applied where suit is brought before the time for delivery has expired, and the seller thus accepts the renunciation as a breach. This is not the view taken by the Supreme Court in *Roehm v. Horst*, 178 U. S. 1; but whatever might be the rule in such a situation, in the present case the Horst Company did not bring suit until the full time for performance had expired. Moreover, in reply to the telegram of repu-

diation, it answered that it could not consent to the cancellation until the payment of the loss sustained (Trans. p. 58), which offer the Brewing Company declined (Trans. p. 59). As the situation of the parties was thus fixed, the Horst Company had the right, at any time before the period allowed for delivery expired, to tender the hops, either from those on hand or from any that it might acquire by purchase or repurchase. Of course, so long as the repudiation was not retracted, no actual tender was necessary.

Sedgwick on Damages, Sec. 636a and cases cited.

Under the foregoing authorities, the evidence of custom was highly relevant. If the jury was satisfied that such a custom existed, it became incorporated in the contract, and the situation was identically the same as if the contract had specified the time for delivery as being that of the shipping season, from the harvest time to the following March.

The authorities also support the instruction given to the jury that "if the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the *last day of the period under which delivery may be made under the contract.*"

J. P. Gentry Co. v. Margolius Co., 75 S. W. 959;

Scruggs v. Riddle, 54 So. 641;

Hill v. Chapman, 59 Wis. 211, 18 N. W. 160.

In a suit by the seller, it is proper to fix damages as of the last day of the time allowed for delivery, *although the price steadily declined during the month.*

C. W. Hull Co. v. Marquette Mfg. Co., 208 Fed. 260.

The ruling which excludes evidence of custom, and also evidence of value later than November, if allowed to stand, not only may seriously prejudice the Horst Company upon a retrial, but it is clearly contrary to the well settled law on the subject, and to the decisions of the Supreme Court of the United States, and other Federal courts. We therefore ask for a rehearing, in order that the question of damages may be fully discussed and passed upon; or, in any event, that the opinion be modified so as to change the rule of damages which it apparently indicates to be the proper one.

4. If the question of the measure of damages is to be reconsidered, as we submit it should, and the law on that subject stated for the purposes of a second trial, we desire to call the Court's attention to the fact that there was no real "market value" for 2,000 bales of hops at any time from November, 1912, to March, 1913; that this quantity could only be disposed of at that particular time by personal solicitation; and that therefore the damages should be based on the best price obtainable for the hops by

the seller, rather than on any market price, at least if the jury believed the evidence to show an absence of market value.

We call particular attention to the following testimony, given by Mr. E. Clemens Horst, the President of the Horst Company :

“Q. Are you familiar with the prices that could be obtained or were obtained in November 4th, 1912, down to and including, say, the first day of March, 1913? A. Yes, sir. Choice air-dried Cosumnes hops could not be sold in that quantity at any price. Because the buying season is over about the middle of October, the beginning of October, the season is practically over, and after that time it is simply a retail trade. I do not know just how many hops were left in the Cosumnes district at that time. I believe a few hundred bales were left over. Sacramento would be the nearest market, the most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time at a profit. There is really no such thing as a market price for hops, because hops are sold on private contract, and are sold in advance.” (Trans. pp. 71, 72.)

Again the same witness testifies (Trans. p. 73) :

“The market was declining very rapidly from November 4th, down to and including the first day of March. It is not possible to sell 2,000 bales of one kind of hops on a declining market.”

On being asked what price could be obtained for 2,000 bales of choice air-dried Cosumnes hops at the end of February, 1913, the witness answered (Trans. p. 79) :

“You could not sell that quantity, no matter what you took, unless you took some slaughtering figure.”

It will be noted also that the Horst Company, writing to the Brewing Company on October 18th, 1912, states this situation clearly:

“You no doubt realize that 2,000 bales of hops is an enormous block of hops to sell at any time of the year and at a time as late as this it is always much harder to sell California hops and there is an enormous difference between the price at which anyone in the hop business would buy 2,000 bales and the price at which he would sell 2,000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.”

The 2,000 bales represented about 400,000 pounds (there are 200 pounds to a bale, trans. p. 74). “They could not possibly be sold in one lot, because 2,000 bales is an enormous quantity of hops.” (Trans. p. 74.) The total hop production of the entire United States in 1912 was 55,800,000 pounds, and it was a year of greater production than usual (Trans. p. 131). Before the repudiation of November 4th, the buying season had expired, and the brewers being generally supplied, all that was left was the chance of seeking out occasional buyers for small lots of the hops. For these reasons, and because “hops are sold on private contract, and are sold in advance. (Trans. p. 72), there is no such thing as a market price for hops, especially where the hops are left on the seller’s hands in a large quantity when the buying season has expired.

It is true that the Brewing Company introduced some evidence tending to contradict the foregoing statements, but the Horst Company was entitled to go to the jury upon the question; and if the jury should find that hops were not readily marketable in the quantity involved, and that there was no generally established market price, it is submitted that the Horst Company would be entitled to the difference between the contract price and the best price obtainable for that amount of hops. Such is the general law upon the subject.

Salem Iron Co. v. Lake Superior Mines, 112
Fed. 239, 245;
Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982,
52 L. R. A. 225.

Moreover, the measure of damages is settled by sections 3311 and 3353 of the Civil Code of California, providing as follows:

3311. The detriment caused by the breach of a buyer's agreement to accept any pay for personal property, the title to which is not vested in him, is deemed to be: . . . 2. If the property has not been resold in the manner prescribed by sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expense properly incurred in carrying the goods to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it.

3353. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it

should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

These sections are applicable in a proper case to the cases arising in the Federal courts.

California Canneries Co. v. Pacific Sheet Metal Works, 144 Fed. 886.

If, therefore, the measure of damages is to be passed upon on this writ of error, the Horst Company should not be confined to a market price which did not exist for the quantity of hops in question; but is entitled to the difference between the contract price and the best price obtainable by it, and that "market price" should not be considered in the ascertainment of the damages if, as a matter of fact, there was no market for the quantity of goods involved at the time of delivery.

Where there is no available market at the time and place for delivery, market value is not ascertained strictly as of such time and place, but reasonable latitude is given in ascertaining it.

Redhead Bros. v. Wyoming Cattle Inv. Co., (Iowa), 102 N. W. 144, 147,

which case declares this to be particularly applicable where the seller does not exercise his right to sell for the buyer's account.

The rule of damages for repudiation in the Federal Courts when there is no open market at the time and

place for delivery is stated in the 5th syllabus of *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239 (50 C. C. A. 213), which syllabus correctly represents the decision found on page 245. We quote:

“5. DAMAGES—BREACH OF CONTRACT—QUESTIONS FOR JURY.

Where a contract for the sale and purchase of iron ore was repudiated by the purchaser before delivery had been completed, but after the seller had the ore on hand ready for delivery, and because of the close of the season there was at the time no open market for the ore remaining undelivered, the difference between the contract price and the best offer which could be obtained for it may be taken as a fair measure of the seller's damages in an action for breach of the contract; the testimony as to such offer, however, to be submitted to the jury to be considered by them in connection with any other evidence bearing on the question of the value of the ore at the time of the breach.”

5. The opinion states that:

“There is no testimony tending to show that it (Horst Co.) could at any time tender or deliver hops of a quality superior to the samples. Indeed, all the testimony is clearly to the contrary.”

The ability of Horst Company to make delivery satisfying the terms of the contract was not put in issue by the pleading or at the trial, and no question on that point was argued in the briefs. The verdict for the Horst Company must have found all neces-

sary facts in its favor. Therefore, it found the Horst Company to have done all that it was bound to do under the contract to be free from any default. No question was saved as to sufficiency of evidence to sustain this verdict and, hence, language above quoted from opinion intimates, if it does not hold, that proof failed in a particular not questioned by plaintiff in error. Such a vital question should be left open on the new trial unprejudiced by any judicial expression until it is fairly raised and argued.

II.

As to the books and selling expense.

This Court predicates its opinion upon the basis that as the repudiation of the contract occurred on November 4, 1912, the damages are confined to the difference in price between that prevailing at or about that time and the contract price. This is upon the theory that the whole two thousand bales had to be delivered at that time. This was not the theory on which the case was tried in the court below. The theory on which the case was tried was that no delivery was to be made until the samples had been approved, and not even then all at one time, but at different times—as late as February, 1913, according to defendant's theory, and, according to ours, as late as the end of the shipping season, and certainly at any time within a reasonable time.

It must be remembered that the evidence shows

that there is no market for hops like there is for wheat or other standard products, but that hops are sold by solicitors by private contract and in the best way that various changing conditions permit. Even Mr. Drescher, witness for the Brewing Company, admitted that he would place the hops in the hands of the brokers in the different markets to draw from. Some in Chicago, New York, Boston, Milwaukee and St. Louis (trans. p. 97).

This Court in its opinion states:

“No doubt evidence of sales made by the Horst Company of these hops within a reasonable time after breach of the contract would be competent as bearing upon the question of market value; but the testimony offered showed sales made in April, May and June of 1913, and one as late as July 19th. It must be self-evident that a sale of hops made in July is no evidence whatever of market value six or eight months previously, especially in view of the testimony on the part of the Horst Company that the price of hops declined rapidly after November 4th, the date of the cancellation of the contract. Furthermore, the market value or price at Milwaukee, the place of delivery, was the criterion, and these sales were made in many different states, and even in the Dominion of Canada. For these reasons the testimony offered was incompetent and irrelevant and should have been excluded.”

No point was made in the briefs or argument that the instruction of the Court as to the market price or market place was incorrect. The Court instructed the jury that if the plaintiff company

“had such hops on hand, it could sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery, then at the market price at the *nearest market* for such commodity, or if there was *no existing market price*, then at the best price obtainable.” (Trans. p. 374.)

It was testified that there was no nearest available market. (Trans. p. 239.)

It was not claimed that there was any error in this instruction, and if it be now claimed there was, we should be granted the privilege of arguing the question.

There was evidence showing that there was no market at Milwaukee for hops (Trans. pp. 71, 72, 73), and the Court left the determination to the jury.

The rule announced in the opinion is in conflict with the authorities.

Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239; 50 C. C. A. 213;
Redhead Bros. v. Wyoming Cattle Inv. Co.,
 — Iowa — 102 N. W. 144, 147.

As to the books showing sales, the Court instructed the jury:

“You have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the *market prices* of such hops at the time of such resales.” (Trans. p. 375.)

It is not claimed by anybody that this instruction was erroneous and no exception was taken to it.

The Court in its opinion overlooks the fact that the Pabst Company offered in evidence the portion of the books showing the date of the sales, the number of bales sold and the prices obtained from each sale.

The record shows that Mr. Horst testified to the prices obtained on sales of Cosumnes hops for approximately sixty days after November 4, 1912. (Trans. pp. 76, 77 and 78.)

Whatever criticism might be directed against this testimony, because of the non-production of the books, was waived when the Brewing Company itself introduced the books on this very question of the prices obtained on other sales.

The following is an extract from the cross-examination of witness Lange (Trans. p. 266) :

“Witness. This book contains the entry of the sales made in the United States after November 4th, 1912, including not only Cosumnes hops, but all the hops sold in Chicago, New York and the San Francisco office.

Mr. POWERS. *I offer page in evidence.”*

The extract from the Horst Company's book thus admitted in evidence sets out in detail all sales made from August 21st, 1912, to July 9th, 1913. It included all the sales testified to by Mr. Horst. It also included other sales ; for Mr. Horst had testified only to the sales from November to January. As far as

the sales testified to by Mr. Horst were concerned, the books introduced in evidence by the Brewing Company verified and repeated every item of his testimony. (See entries introduced by defendant, Trans. pp. 267, 268.)

By thus introducing the books themselves, showing the very items complained of, the defendant Brewing Company without question waived any objection to the testimony as to the prices obtained.

Jaegel v. Johnson, 148 Cal. 695.

Where incompetent evidence is admitted over objection, and upon cross-examination, the objecting party introduced the same testimony, he is estopped to raise the question of competency upon appeal.

Scott v. Union & Plainters' Bank & Trust Co.,
123 Tenn. 258, 130 S. W. 757, 765.

To the same effect is

Rodier v. Life Ins. Co. of Virginia, 32 App.
Cas. D. C. 159.

In *Jenkins v. Salem Brick & Lumber Co.*, 45 So. 435, the appellant complained of the admission in evidence of a certain deed. The Court said:

“Whatever good ground there may have been for the objection, it is answered by the fact that defendant, in order to set up his own chain of title, was driven to the necessity of introducing this very deed in evidence. It disposes of whatever force there may have been in the objection.”

Again, in *Cathey v. Missouri Ry. Co.*, 124 S. W. 217, a witness, who was a stationkeeper of a railroad, was allowed by the trial court to read to the jury from an incompetent register, not prepared by him, showing when certain trains passed. The judgment was at first ordered reversed on this ground; but when the court's attention was called to the fact that plaintiff, on cross-examination of witness, caused him to repeat or re-read substantially, if not identically, the same evidence, *a rehearing was granted* and the judgment was affirmed.

As the Pabst Company itself introduced in evidence the pages showing the times of sale and amounts realized, there can be no error in that.

The only other items the books showed were the *expenses of sales*.

While we think these were properly admitted, yet the amount of selling expense is accurately figured. They were:

Storage	\$ 153.50
(Trans. p. 201.)	
Insurance	25.98
(Trans. p. 204.)	
Freight or tare	188.43
(Trans. pp. 204-5.)	
Interest	310.73
(Trans. pp. 206-7.)	
Proportionate share of overhead expense	4459.30
(Trans. p. 179.)	
Uncollectible accounts	262.19
(Trans. p. 149.)	

If all of these last named items or any one of them was improperly admitted, we hereby offer to allow the judgment to be reduced by such amount.

If the trial court has erroneously instructed the jury as to the measure of damages in a certain particular, and it is apparent that the erroneous assessment under the instruction could not have exceeded a given sum, *the appellate court will affirm the judgment on the condition that plaintiff remit such excess.*

Hazard Powder Co. v. Volger, 58 Fed. 152;
Washington v. Harmon, 147 U. S. 571.

III.

As to the testimony of Chalmers and Treganza.

The Court has unwittingly fallen into error as to what occurred with reference to the testimony of Chalmers and Treganza. This Court says:

“The testimony thus offered tended strongly to show that the hops were not of choice quality, and the Horst Company was not able to perform its contract with the Brewing Company. The testimony should not have been limited to the quality of the hops contained in the samples, because it was incumbent on the seller to go further and show that the hops actually tendered were equal in quality to the samples furnished in order to show its ability to perform the contract. But if it be conceded that the testimony should have been limited to the quality of the hops contained in the samples, we still think the rejected testimony had a direct tendency to

corroborate the witnesses who testified that the samples did not exhibit a choice quality of hops for the reason that the hops contained stems and leaves and were not cleanly picked.”

The Court is under a misapprehension as to this testimony.

The only testimony rejected was hearsay testimony, and even to this plaintiff withdrew all objections and asked that Mr. Chalmers and Mr. Treganza be allowed to testify, and defendant declined to put the testimony in.

It is our contention that on the theory on which the case was tried in the court below, that the defendant was not justified in repudiating the contract if the plaintiff offered to supply hops equal to the samples submitted by the defendant. Such hops could have been secured any where. But conceding that they had to be secured from the plaintiff's hop yard, and conceding that it could be shown without identification that on a certain day hops were being picked that were not clean, *such testimony was given.* The testimony excluded was *hearsay evidence* of a man on the ranch, and even to this plaintiff waived its objection.

This Court in its opinion quotes from the transcript on page 300. But immediately following the matter quoted by this Court the record shows that the *testimony was given.* The only testimony excluded was *hearsay.* The record shows the following:

"The COURT. Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial.

Mr. POWERS. We will connect it with the testimony of Mr. Horst himself. Mr. Horst has testified that all of the hops were baled in one lot.

Mr. POWERS. (Q.) At this time, while you were there, were the hops of the season of 1912 being baled?

A. Yes. They were running them from the kiln over to the cooler before they were baled.

Q. That was all going on simultaneously?

Q. What operations were going on at the hop-house at the Horst ranch while you were there?

A. They were picking, drying and baling too.

Q. Explain to the jury what the processes were on the ground, from the green hops to the picker and so forth.

A. There is no man under the sun who could swear that they were the same hop, only the man that shipped the hops.

Mr. POWERS. Q. These were hops on the Cosumnes ranch of Mr. Horst?

The COURT. State what you saw at Mr. Horst's ranch while they were baling Cosumnes hops.

A. That is picking and all. I went up there just to see the picking machine. It was my first experience with a picking machine. I have picked by hand all my life.

The COURT. Leave out all of that. Tell us what you saw.

A. I went there to see the picking machine run, and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said 'I will show you.' We went to the back

end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, 'Don't you pick out none of the leaves.'

Mr. POWERS. (Q.) What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there baling them. They were going into a bale, then they were putting them out on the plains in the boiling hot sun with no cover over them whatever." (Trans, pp. 301-303.)

It is evident that the witness testified to all that he saw. He then was asked to give *hearsay* testimony as to a conversation with a man on the ranch. The record shows the following:

"Q. What was *said to you* by the man in charge with reference to the manner of baling hops, so far as the leaves and twigs were concerned?

Mr. DEVLIN. I object to that as irrelevant, immaterial, incompetent and *hearsay*.

The COURT. The objection is sustained.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912.

A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge *say any-*

thing to you about the manner in which he was picking hops so far as leaves and stems were concerned.

Mr. DEVLIN. I object to it as irrelevant, incompetent and immaterial.

The COURT. Objection sustained.

Q. Was anything *said* by the man in charge of the picking machine and the hop house concerning instructions because of certain goods that were to be used to fill an eastern order.

Mr. DEVLIN. I object to this as simply repetition of the same line of testimony."

The only testimony the Court excluded was *hearsay*, as to what a man said without showing that he was authorized by any one to say it.

Now as to Treganza.

The only question asked Treganza was as to a conversation that was *hearsay*. The record shows some preliminary evidence on the part of Treganza, and then that counsel confined the evidence to *hearsay*. The record shows that to make the record clear counsel for the Brewing Company asked this question :

"Mr. POWERS. Did the man in charge of the picker *state* what his instructions were with reference to the manner of handling the leaves and twigs."

This was objected to and the objection was sustained. (Trans. p. 309.) Then Mr. Powers made an offer of what he expected to show by the witness, as follows :

"Mr. POWERS. We offer to show that the plaintiff wilfully made the hops so unclean that it would be impossible for the samples to be in prop-

er condition ; that he wilfully included stems and leaves, and said he was doing so because he had to make weight on account of the fact that he had a contract in the east. The testimony is that there was only one contract." (Trans. p. 310.)

The Court said :

The COURT. If you can show anything of that kind, I will let you show it." (Trans. p. 310.)

And then occurs the following :

The COURT. If you can show that the plaintiff stated that, not some man on the ranch, but if you can show that the plaintiff has made a statement of that kind, I will let you show it.

Mr. DEVLIN. I would like to ask if Mr. Powers in good faith intends to prove that Mr. Horst said that, and not some man on the ranch.

Mr. POWERS. Not Mr. Horst personally, but a man in charge of the work for Mr. Horst at that time.

Mr. DEVLIN. That has been ruled on before.

Mr. POWERS. I want to show by the man who was in charge of the property at that time, your Honor. This man was in charge there and represented Mr. Horst at that time.

Mr. DEVLIN. Your Honor has ruled that he may show that Mr. Horst made a statement of that character. He cannot show that somebody else made that statement.

The COURT. The plaintiff is a corporation. Of course, Mr. Horst may be the principal owner, but one employed by a corporation can bind the corporation by his statements, if he is shown to occupy the proper relation. I cannot tell.

Mr. POWERS. (Q.) Will you tell me who you saw at the hop-house at the time you were there in August, 1912.

A. I cannot tell you the man's name.

Q. What was he doing?

A. He had charge of the picking machine.

Q. How many men did he have under him?

Mr. DEVLIN. I object to that on the ground that he does not know that of his own knowledge.

The COURT. (Q.) Do you know anything about who the man was?

A. I do not, only that he had charge of the picking machine. He told me he had. He took me about the house and showed me various places and gave orders to the men about the place. I guess the men obeyed him. They seemed to do the work as he told them. He told them how to take the hop vines down and put them in the picking machine. He had nothing to do with the bales that were outside, but with reference to the drying process he had nothing to do with that. He had charge of the picking machine.

Q. What, if any, was said by the man in charge of the picking machine concerning instructions with reference to the hops that were going into the picking machine?

Mr. DEVLIN. I object to that on the ground that it is irrelevant, incompetent and immaterial and hearsay.

The COURT. Objection sustained.

Mr. POWERS. Exception." (Trans. pp. 310-312.)

The objection occurring on page 309 of the transcript was confined to the call for hearsay evidence. But even if otherwise, the only testimony excluded was hearsay.

Whatever may have been anybody's recollection of what occurred during the trial, of what was stricken out and what remained in the record, the record quoted above accurately states it.

The opinion in this regard is also based on the

mistaken assumption that a tender had been made of specific hops. The opinion contains the following discussion of Chalmers and Treganza testimony: "These rulings were erroneous. It was conceded throughout the trial that the *hops tendered* came from the ranch in question and were picked by a picking machine. The testimony thus offered, tended strongly to show that the hops were not of choice quality and that the Horst Company was not able to perform its contract with the Brewing Company. The testimony should not have been limited to the quality of the hops contained in the samples, because it was incumbent on the seller to go further and show that the *hops actually tendered* were equal in quality to the samples furnished in order to show its ability to perform the contract."

Attention has already been called to the fact that no tender of any hops was ever made, because the Brewing Company repudiated the contract before the parties had reached that stage of performance of the contract. The discussion in the opinion of this testimony is therefore predicated upon the same mistake which influenced the Court's consideration of the question of damages and custom. Since no tender was made, the proffered testimony had no relevancy upon any question before the Court of the quality of any specific hops.

Even that part of the testimony of these witnesses which is discussed in the opinion of this Court (and which was actually admitted), the testimony as to

their observation of the picking machines, was irrelevant and should have been excluded. It did not bear on the ability of the Horst Company to perform the contract, because it was confined to conditions at only one of the two ranches of the Horst Company in the Cosumnes district, and to conditions there only on one day.

The witness Chalmers testifies that he visited the ranch in question "about the last of August or the first of September." (Trans. p. 300.) And the witness Treganza testifies that the visit occurred "in the latter part of August." (Trans. p. 309.)

It also appeared in evidence that the hops in this district were picked by the Horst Company from August 12th to September 7th, the amount picked upon each day being set out specifically on pages 119 and 120 of the transcript.

The conditions attempted to be testified to by these witnesses might have prevailed on any one of the several days during which hops were being picked; but the inference that therefore the same conditions prevailed on every other day of the hop picking season would be exceedingly weak.

Moreover, the particular ranch which was visited by these witnesses was the so-called Murphy ranch. (Trans. p. 371.) This was only one of the two ranches operated by the Horst Company in the Cosumnes district during the year 1912. ("We have a couple of ranches at Cosumnes." Trans. p. 143.)

Certainly the conditions on this particular ranch had no relevancy whatever as tending to show the condition on the other.

Furthermore, evidence of the condition of the Horst hops was irrelevant on the issue of ability to perform because, as already pointed out herein, the Horst Company was not under the contract confined to hops which it had grown, but had the right to procure other hops.

The answer of the defendant alleges that the contract was modified so as to be a contract for the sale of hops corresponding in quality to the four samples sent by it to the Horst Company. (Trans. pp. 29 and 30.) Whether the contract was modified in this respect or not, it is certainly true that after the Brewing Company had submitted samples upon which it agreed to accept delivery, which samples were *not air dried* Cosumnes hops, and which were *not machine picked*, it could not thereafter be heard to say that the Horst Company was unable to perform its contract because of its inability to obtain air dried, machine picked hops. In other words, the tender of samples of kiln dried, hand picked hops by the Brewing Company to the Horst Company, was an unequivocal waiver of their right to insist that the delivery be made of only air dried and machine picked hops. After this act on the part of the defendants, the Horst Company could certainly have procured hops other than those which they themselves had grown, and if the Horst Company had this right, then

the testimony of Chalmers and Treganza was of no value whatever as bearing upon the question of the ability of the Horst Company to comply with its contract.

The opinion concludes the discussion of the Chalmers testimony as follows :

“But if it be conceded that the testimony be limited to the quality of the hops contained in the samples, we still feel the rejected testimony had a direct tendency to corroborate the witnesses who testified that the samples did not exhibit a choice quality of hops, for the reason that the hops contained stems and leaves and were not cleanly picked.”

We respectfully submit that this testimony had no proper bearing upon the quality of the samples for several reasons. In the first place the samples, whose quality was in issue, were not all taken from the Cosumnes district. (Trans. p. 81.) It did not appear in evidence that any one of all the samples submitted came from the Murphy ranch of the Horst Company, which was the only ranch visited by these witnesses. The failure to connect the testimony with any one of the samples, and the absence of any testimony that the samples were drawn from the hops picked at or about the time of the visit, utterly destroys any relevancy that this testimony might otherwise have.

But assuming (contrary to the evidence) that it had been proved that the samples were taken from the specific ranch visited and were taken from spe-

cific bales made up of the hops picked at the time of the witnesses' observations, still the evidence has so little value that it should not be entitled to consideration. It is to be noted that all hops, commercially speaking, contain some leaves and stems and other extraneous matter. And furthermore, that hops are not uniform throughout the bales as to the amount of leaves and stems which they contain. (Trans. p. 122.) Whether there is such a proportionate quantity of extraneous matter that the hop ceases to be choice, is to be determined by a person familiar with the commodity from his observation of it. (Trans. p. 115.) The presence of leaves or stems and the consequent effect of dirty picking can be ascertained by observation and is apparent to the eye. As far as this defect is concerned, it is not in any degree a latent defect.

Under these circumstances the examination of the physical sample is so far superior as evidence of quality to the observation of the picking machine at a previous stage in the production of the hops as to render testimony as to the latter valueless. In other words, a witness examining the actual sample after its being prepared, can tell just what quantity of extraneous matter is contained in the sample. After observation of that fact, he can, if he be an expert, express an opinion as to whether or not there is an undue amount of such extraneous matter. In this case many witnesses were called upon this question. The samples were in court and were examined by

the witnesses, and their testimony was contradictory upon the point. Obviously, it was no help to the Court or the jury that some other witness should come forward without any knowledge of the quality of the actual samples—which was the precise point in issue—and testify that he saw the hops being picked, and that at the time he observed the amount of extraneous matter, and that in his opinion such amount was excessive. His opportunity to observe the proportion of extraneous matter was not nearly as good as that of the witnesses who, in court, examined the samples there produced, and his opinion, especially where it does not appear that the samples were taken from the very hops which he observed being picked, is of such slight value as to throw no light upon the other contradictory testimony.

If the testimony of Chalmers and Treganza had to do with some alleged hidden defect in the samples, which would be more evident at the time of picking, it might be entitled to consideration; but the presence of the leaves and stems could as readily be ascertained, and their proportionate amount far more accurately determined by the examination of the samples actually submitted.

But the exclusion of any of the Chalmers and Treganza testimony was without prejudice to the Brewing Company, because the admitted facts of the case showed that the question of the quality of the samples was immaterial, and that the Brewing Company was in default, whatever their quality.

In the first place it was admitted that at the time of the cancellation of the contract by the Brewing Company, the time allowed for performance had not expired. The Horst Company claims that, by reason of the custom already discussed, the time for performance ran to the 1st of March, 1913. The Pabst Company claims that, by reason of a modification of the contract, the time for delivery extended from October, 1912, to February, 1913. Admittedly, therefore, the Horst Company had, at the time of the cancellation, further time within which to submit samples, if, indeed, the submission of samples was necessary.

It is true that the opinion states that "there is no testimony tending to show that it could at any time tender or deliver hops of a quality superior to the samples." This statement, however, overlooks the fact to which attention has already been called, that the Horst Company was not confined to its own crop, but could go elsewhere and secure other hops of a still higher grade than those represented by the samples. It appears admittedly in evidence that there is a grade of hops higher than "choice," and that this higher grade is known by the trade as "fancy." (Trans. p. 122.) For aught that appears in the record, the Horst Company might have procured fancy hops for delivery to the Brewing Company after the time of cancellation. From the foregoing it follows that all testimony with regard to the quality of the samples, including the testimony of Chalmers and Treganza, was immaterial.

Moreover, it was admitted by the defendant, through its President, Mr. Gustav Pabst, in his deposition in the case, that one of the samples submitted by the Horst Company was "choice." (Trans. p. 326.) This admission absolutely precludes any question as to the quality of the samples.

It is true that the witness Pabst claims that this sample was too small in size, but the defendant Brewing Company is precluded from raising this objection because it rejected the samples on different grounds, and thereby waived this objection. As to this the law is well settled. The Court instructed the jury in this regard as follows :

"Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they are sent, it is now too late for defendant to take advantage of that objection, even if well founded."

The Court's charge to the jury in this regard is well supported by the decisions as will appear from the following cases :

Littlejohn v. Shaw, 53 N. E. 810;
Ginn v. Clark Coal Co., 106 N. W. 867.

Since one of the samples was admitted to be "choice," since the only fault the defendant could find

upon the trial was its size, and since the defendant had already waived this objection by a rejection on other grounds, the Court should have excluded all evidence whatever bearing upon the quality of the samples, and its exclusion of the particular evidence of Chalmers and Treganza upon this question was highly proper.

But even if there was any possible error the Court overlooks the withdrawal of all objections and consent to the introduction of the evidence. The record shows :

“MR. DEVLIN. I would like to have Mr. Chalmers brought back here for cross-examination. Yesterday he testified as to a certain conversation, or certain acts being done. We have assembled all of the men that were on the Murphy ranch. They are all in the courtroom here. I want Mr. Chalmers to point out the gentleman he claims he had any conversation with. *I withdraw our objections* that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.

MR. POWERS. I have no objection to it at all. I have no more control over Mr. Chalmers than you have.

THE COURT. I suppose he went away thinking that you were through with him.

MR. BUTLER. I think I can get him.

MR. POWERS. Do you want Mr. Treganza also?

MR. DEVLIN. Yes.” (Trans. pp. 312-313.)

This cured all possible objection.

Error in excluding evidence is cured by a season-

able withdrawal of the objection on which it was ruled out.

38 Cyc., citing many cases.

Kahn v. Trust Etc. Co., 139 Cal. 346;

Mitchell v. Davis, 23 Cal. 384;

Estate of Ross, 50 Cal. Dec. 304.

The above covers the only points mentioned in the opinion, save that as to air-dried hops. On this point, as the opinion says :

“This ruling is of little moment, because no testimony of any consequence was excluded by reason thereof,”

and such was the fact.

IV.

Opinion as law of the case on retrial.

It is most important to defendant in error that the opinion be opened for reargument if, as has been pointed out, an erroneous rule of damages has been stated in the opinion of this Court, or improper rules of evidence announced, or if questions not made were decided, or if it has intimated incorrectly that Horst Company was unable to make delivery of the hops according to contract. For while *obiter* might not be taken as the law of the case on retrial, it may embarrass the lower court.

3 Cyc. 494;

Barney v. Winona & St. P. R. Co., 117 U. S. 228,

and a matter ruled on as important for purposes of a new trial and passed on for that purpose, though not essential to a decision, becomes the law of the case.

3 Cyc. 494, citing
Table Mountain Co. v. Stranahan, 21 Cal. 548;
Poag v. McDonald, Fed. Cas. No. 11238,

and an opinion passing on unnecessary questions is entitled to great weight.

Produce Bank v. Morton, 42 N. Y. Super Ct. 472;

See also

Huttenmeier v. Albro, 2 Bosw. (N. Y.) 546.

The opinion of this Court ought not to contain expressions which the trial court might deem to be conclusive on it where such expressions may affect questions of law or fact in the case which the judgment on error did not reach. Such questions ought to be left open for the new trial.

PETITION.

The defendant in error respectfully petitions for a rehearing and reargument. If the Court, however, should not grant that, it respectfully petitions:

1. That the judgment be affirmed on condition that the defendant in error remit the selling expense.
2. That the opinion be modified by striking out

that portion relating to the rule for damages, or that damages should be computed as of November 4, 1912, rather than of the time allowed for performance.

Respectfully submitted,

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Dated, March 18th, 1916.

CERTIFICATE.

We hereby certify that, in our judgment, and in the judgment of each of us, the above and foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Dated, March , 1916.

W. H. CARLIN,
MAURICE E. HARRISON,
DEVLIN & DEVLIN,

Attorneys and Counsel for Defendant in Error.

I, Robert T. Devlin, of counsel for the defendant in error herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

ROBERT T. DEVLIN.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,
vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

**Plaintiff in Error's Statement of Facts Con-
cerning Record in Opposition to
Petition for Rehearing.**

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

Filed

MAR 27 1916

F. D. Monckton,
Clerk

“to this plaintiff withdrew all objections and asked
 “that Mr. Chalmers and Mr. Traganza be allowed
 “to testify, and defendant declined to put the testi-
 “mony in.”

The record shows that this last statement is not the fact.

The first day witness Chalmers appeared the Court struck out the whole of his testimony concerning “picking.” The next day the following occurred, viz:

“MR. DEVLIN—I would like Mr. Chalmers brought back for cross-examination. Yesterday he testified as to certain conversations, or certain acts being done. . . . I withdraw our objections that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.

“MR. POWERS—I have no objection to it at all. I have no more control over Mr. Chalmers than you have.

“THE COURT—I suppose he went away thinking that you were through with him.

“MR. BUTLER—I think I can get him.

“MR. POWERS—Do you want Mr. Traganza also?

“MR. DEVLIN—Yes.”

Thereafter both witnesses were brought back and (at page 363) the record shows Mr. Chalmers was recalled and then testified amongst other things the following:

“The picking machine strips them right off. The leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine

at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped."

The Court then ruled:

"All this will have to go out. The witness has shown that he does not know anything about it."

The witness was then asked the question:

"Q. Do you know about the relative time that hops usually ripen?"

"THE COURT—I cannot permit you to go into that.

"MR. BUTLER—Exception."

The Court subsequently said:

"THE COURT—This evidence should not be permitted to stand. It is absolutely indefinite.

"MR. DEVLIN—It is stricken out, your Honor.

"THE COURT—Yes.

"MR. BUTLER—Exception.

"MR. POWERS—Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?"

"THE COURT—I am striking out the whole

of it. There is nothing to connect it with the plaintiff.

"MR. BUTLER—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.

THE COURT—I make the same ruling. Exception."

That the Court struck out all of the Chalmers and Traganza testimony is also shown by the record at pages 366-367, reading as follows:

"During the argument Mr. Powers referred to the testimony of witness Chalmers with reference to the green condition on which plaintiff's hops were picked in 1912."

Thereupon Mr. Devlin interrupted as follows:

"That testimony was stricken out. Counsel is now referring to testimony that your Honor has stricken out.

"MR. POWERS—Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.

"THE COURT—All of his testimony went out.

"MR. POWERS—Including that about the picking?

"THE COURT—Yes, it was wholly irrelevant. The question is: What was the quality of these hops when they were tendered to the defendant?

"MR. POWERS—Exception."

Certainly the testimony of Chalmers which is herein quoted is not hearsay testimony. Certainly the statement that witness actually saw hop vines pulled right

through lengthwise and that no leaves or stems were stripped off, and the statement that the little stems, twigs and leaves went in the bales with the hops, is not hearsay testimony.

The testimony given by Chalmers prior to the time that the Court made the ruling to strike it all out, included the following (page 303):

“Q. What was the condition of the hops in the Cosumnes District with reference to ripeness on or about August 12th, 1912?

“A. They were green. Too green to pick. They ripen from about the 20th to 25th of August. There were no hops ready to pick before that.”

This was certainly not hearsay testimony.

Mr. Horst had testified (page 119) that from August 12th to August 20th, hops aggregating 751,206 pounds had been picked on his Cosumnes Ranch.

Consequently this witness, who had been growing hops in the Cosumnes District for over thirty years (page 300), whose ranch was about eight miles from the ranch in question, testified not on hearsay but after observation to the greenness of the hops and that the hops he saw being picked with the machine so out of order that it didn't remove leaves and stems which were “going into the bales and they were putting them out in the plains in the boiling hot sun with no cover over them whatever.”

This was on the Murphy ranch, which was one of the two Horst Cosumnes ranches.

Mr. Horst had already testified that all the hops from all the ranches were practically the same in character and quality, as follows (page 105) :

“With the exception of 150 bales, all the rest of the bales are of equal grade. They were all choice grade, every bale. One bale was substantially as good as the other.”

The witness had already testified that 150 bales, called “pick-ups,” were practically refuse hops of an admittedly inferior quality which had no connection with the hops intended for Pabst Co. Hence whatever happened to establish the grade of the Murphy Ranch product was establishing the same grade of choiceness as to the other ranch product.

The ruling of the Court refusing the Chalmers testimony prevented counsel attempting to present any facts about the other ranch.

Again at page 35, counsel say: “The only question that was asked Traganza was as to the conversation that was hearsay.”

The record shows this not the fact.

The record shows while the witness was answering the preliminary questions, the following incidents happened (page 309) :

“MR. DEVLIN—I object to this testimony as evidently in line with the previous testimony of Mr. Chalmers. I object to it as irrelevant, incompetent and immaterial.

“THE COURT—Is it to the same purpose?

“MR. POWERS—Yes.

"THE COURT—Objection sustained.

"MR. POWERS—Exception.

"MR. POWERS—So I may make the record clear.

"THE COURT—You say it is the same as Mr. Chalmers' testimony. You have your exception to that.

"MR. POWERS—All right."

After Mr. Chalmers was recalled and testified that he was at the ranch for two and one-half hours with Mr. Traganza and that no leaves or stems were stripped off the vines and that the picking machine was not working effectively, and after the Court had said concerning Mr. Chalmers' testimony, "I am striking out the whole of it. There is nothing to connect it with the plaintiff" (foot of page 364), the record following an exception taken by Mr. Powers reads as follows (page 365):

"MR. BUTLER—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.

"THE COURT—I make the same ruling. Exception."

It will be seen, too, that Mr. Horst testified (page 105):

"It took about three or four weeks to pick about 4500 bales. We used a machine. We started in picking the ripest first, then went along and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. . . . The conditions being the same

on our land as the conditions on other people's land, our hops ripen substantially as other people's ripen."

Again at page 106:

"Q. Did you ever know of a crop of hops picked on anybody else's land of over 4500 bales where the crop was uniform in quality throughout, before?

"A. Why, yes. . . .

"Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality."

SECOND: AS TO THE HOPS HORST WAS ABLE TO TENDER.

At page 38, counsel say "attention has already been called to the fact that no tender of any hops was ever made because The Brewing Company repudiated the contract before the parties had reached that stage of performance of contract. The discussion in the opinion of this testimony is therefore predicated upon the same mistake which influenced the Court's consideration of the question of damages and custom."

The facts are, Horst testified (page 366) with reference to November 4th, 1912, as follows:

"Q. On that date if the defendant was willing to accept, were you able, ready and willing to deliver the 2000 bales hops equal in quality to samples 21, 22, 23 and 24?

"MR. POWERS—I object to that on the same ground.

"THE COURT—Objection overruled.

"A. Yes.

"MR. POWERS—Q. Where were these hops?

"A. They were in that 3042 bales, an accounting of which we have given you."

The 3042 bales referred to were air dried Cosumnes hops manufactured by himself and were represented by samples 1 to 20, which were taken from the bales which were being picked at the time Chalmers and Traganza saw the picking machine at work.

This matter was discussed in our opening brief at pages 172 to 175.

THIRD: AS TO DEFENDANT HORST COMPANY'S RIGHT TO BUY OTHER COSUMNES HOPS TO FILL CONTRACTS.

At page 40, counsel say "the tender of kiln-dried hops by Pabst to Horst was a waiver of their right to insist that delivery be made of only air dried hops," and then they add, "After this act on the part of the defendant, the Horst Company could certainly have procured hops other than those which they themselves had grown, and if the Horst Company had this right, then the testimony of Chalmers and Traganza was of no value whatever as bearing upon the question of the ability of the Horst Company to comply with its contract."

No one but the Horst people themselves had ever questioned the right of the Horst Company to pro-

cure any Cosumnes hops equal to samples 21 to 24 to fill their contract.

However, as they did not have such hops on hand on November 4th, 1912, this question is purely academic.

It was the duty of the Horst Company from and after the breach on November 4th, 1912, to minimize the damages as much as possible. Nothing could be gained by their going through the idle process of buying hops to tender on this contract, because the ruling of the Court is that they would be entitled to damages in the difference between the selling price and the market price prevailing at the time or soon thereafter.

If the Horst Company had gone out and bought other hops to fill this contract it would not have changed the rule of damages at all. It would of course have been compelled to pay the market price referred to in the opinion of Judge Rudkin, to-wit: the market price on November 4th, or soon thereafter; and Horst would have then tendered them at Milwaukee, and then the damages would have been the difference between the contract price and the price thus paid, plus expense of carriage to point of delivery.

In other words, they would have actually incurred the expense which is one of the factors in determining the damages which Judge Rudkin says they are entitled to without incurring this expense.

Consequently the discussion of the question as to their right to fill the contract by purchasing other hops

is of no value to the solution of the question involved here.

FOURTH: AS TO THE CLAIM OF TIME OF DELIVERY BY PABST CO.

Counsel say (page 44): "The Pabst Company claim that, by reason of a modification of the contract, the time for delivery extended from October, 1912, to February, 1913. Admittedly therefore the Horst Company had at the time of the cancellation further time to submit samples, if indeed the submission of samples was necessary."

The record shows this not to be a fact.

The only foundation for this claim is that Pabst Company in its answer while setting forth the several steps which led up to the final binding contract alleges that at one transition stage there was a modification of the then inchoate agreement to include delivery till February, 1913, because of the acceptance of a letter on Horst's part, which acceptance Horst denied. The next clause of the answer alleges that this inchoate agreement was superseded by another and further agreement, to-wit: the sample agreement on which the Pabst Company relied. These allegations setting up the sample agreement appear in the answer at page 29, as follows: That

"thereafter (referring to the modification last hereinbefore referred to) the plaintiff in writing offered the defendant to modify any contract which

might have been entered into between the plaintiff and defendant by the telegraphic offers and acceptances as aforesaid, in the following respect, that is to say: The plaintiff in writing offered defendant that if defendant would submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, of such character and quality as the defendant would be willing to accept, the plaintiff would procure and sell and deliver to the defendant two thousand bales of choice Cosumnes hops equal in all respects to the samples so to be presented and submitted by the defendant to the plaintiff; that the defendant accepted the last mentioned offer and did in accordance with said acceptance present and submit to the plaintiff samples of choice Cosumnes hops which it had procured elsewhere, and informed plaintiff in writing that it would be willing to accept and purchase and pay for two thousand bales of choice Cosumnes hops from the defendant if the same were in all things equal in quality to the samples so submitted by defendant to plaintiff."

Moreover the counter-claim set forth in the answer specifically states what the position of the Pabst Company was, namely, that Horst had contracted to sell and Pabst had contracted to buy 2000 bales of Cosumnes hops equal in all respects to samples to be presented and submitted by Pabst.

During the trial at the time Pabst's first witness was introduced, counsel announced to the Court (page 93) that their theory of the case was that there was a modification of the contract and that the contract did not require Horst to furnish air dried hops, but that the contract had been modified.

The exact terms of the modified contract was set forth in the instruction requested by Pabst, which was rejected, which rejected instruction is set forth in extenso at page 22 of our brief, and the position taken by Pabst Company during the trial of the case was that taken by them on the argument as set forth in the brief at pages 22 to 26.

Never at any time during the trial of the case did Pabst Company claim that there was an actual existing modification of the contract which included delivery to February, 1913.

Pabst position was that there was no such provision in existence at any time after the telegrams of October 23rd, 1912, from Pabst, and the letter from Horst of October 29th, 1912, accepting the proposition.

FIFTH: AS TO THE BOOKS AND SELLING PRICE.

Counsel say at page 28, "the record shows that Mr. Horst testified to the prices obtained on sales of Cosumnes hops for approximately sixty days after November 4, 1912."

This is not the fact.

Mr. Horst testified to what his bookkeeping expert reported to him as having been reported by the salesmen in Chicago and New York to be the prices obtained for Horst's peculiar air-dried Cosumnes hops during that time.

Neither Mr. Horst nor any other witness testified

as to what the market price for Cosumnes hops of the character of samples 21 to 24 or of any other hops was at the several places where the hops were sold on the dates of sale.

In fact we can go further because the record shows that no witness testified as to the market price of any Cosumnes hops anywhere at the dates and places the sales were claimed to have been made by Horst's agents.

At page 29, counsel say, "By thus introducing the " books themselves, showing the very items complained " of, the defendant Brewing Company without ques- " tion waived any objection to the testimony as to the " prices obtained."

The Pabst Company did not introduce any books.

While cross-examining witness Lange in order to prove that the testimony which had been given by him was not in accordance with the items used by him, one page of the sales book was introduced on the last day of the trial, but the other books were not available and were not introduced.

This testimony was not introduced to prove any fact on behalf of Pabst Company but to contradict the testimony of Horst's bookkeeping assistant himself.

At page 41 of our opening brief, we explained the effect of this particular page of testimony.

It was not introduced by us for the purpose of showing sales and it did not show sales and it was hearsay

evidence. It was simply introduced to show the error in Lange's testimony in making his compilations.

The rule in such cases is not that referred to by counsel as is shown by his own quotation in case of *Jenkins v. Salem Brick & Lumber Co.*, 45 So., 435, where the Court said:

"When the defendant in order to set up his own chain of title, was driven to the necessity of introducing this very deed in evidence," he waived objection.

Certainly this is an entirely different matter from the introduction during cross examination of testimony to contradict the witness who used the book, especially where the other books were not available to defendant. The testimony was not in any way used to prove Pabst's claim of title or any other fact to establish Pabst's case, except in the negative way of disproving Horst's case. The page of the book was introduced solely for the purpose of showing the flimsy character of the data from which the witness was testifying and not as evidence of the facts it contained.

SIXTH: AS TO OFFER TO REDUCE JUDGMENT BY SELLING EXPENSE.

We have shown at pages 57 to 74 of our opening brief, that all the testimony as to prices, expenses and overhead was hearsay evidence and that the entire stream of testimony was made turbid and impossible for use because of the impossibility of determining the

accuracy of the facts reported by third parties to the witnesses. The idea of purifying such a stream of testimony by omitting such of the errors as were evident is like purifying a chemical mixture by filtering out so much of the solid matter as had not been dissolved prior to the time of the filtering.

The characteristics of the solid matter had already been absorbed by the liquid before the filtering became possible.

The foundation of Horst's case is so interwoven with all this hearsay evidence that it is impossible to alleviate the damage by segregating any part of it.

The very foundation of the sale price as proven was merely the compilation of reports made by third parties to another party without the proof of the market price or the conditions surrounding the sales at the time the sales were made.

This is shown in our brief, pages 74 to 79.

SEVENTH: AS TO THERE BEING NO MARKET PRICE FOR A LOT OF HOPS AS LARGE AS TWO THOUSAND BALES.

The only testimony quoted on this subject is that of Witness Horst.

At page 167 of our brief we call the Court's attention to the evidence of three other witnesses:

One man, Koch, testified that he was seeking to purchase 1000 bales Cosumnes from 17 to 17½ cents a pound in November, 1912. Another man, Sweeney,

actually paid $18\frac{3}{4}$ cents a pound for 1500 bales of Cosumnes hops in November, 1912. Another man, Drescher, said he was selling Cosumnes hops in November, 1912, from 17 to 19 cents and that the market would take 2000 bales in six weeks, and at 16 cents would take them inside of a week.

It must be apparent that hops are the same as anything else. If cut up in comparatively small lots or if the price was lowered $\frac{1}{2}$ a cent or one cent a pound they could have been sold within what Judge Rudkin calls soon after November 4, 1912.

The idea that the 2000 bales could not be sold at Sacramento or at Milwaukee, or any other place in the United States that has telegraphic communications with brewers, is absurd. Moreover, it is against the evidence.

EIGHTH: AS TO THE RULE OF DAMAGES BEING IN CONFLICT WITH AUTHOR- ITIES.

The pleadings themselves show that Horst Company intended to rely upon the rule laid down by Judge Rudkin at the time the suit was brought. As is shown by their complaint set forth at page 2.

The same rule is that which was invoked by Horst himself in his letter tendered as a compromise on October 28, 1912, when he said:

“As you will not take the 2000 bales of hops sold you on quality equal to any of the 20 samples

we sent you, nor commit yourselves to take any hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

"To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you."

Now the only twenty samples sent them were the samples 1 to 20 which were drawn from their own air dried Cosumnes hops and which were the same hops as were referred to in Mr. Horst's testimony herein quoted as being part of the 3042 bales available for delivery on November 4th.

It is admitted that Horst did not set aside any portion of those 3042 bales to Pabst; that he did not carry them as Pabst hops; that he did not sell them as Pabst hops.

The present theory as set forth in Horst's petition is based upon the fact that the final contract was only made to deliver hops equal to samples 21 to 24.

This being so the argument made by us at pages 133 to 137 of our brief is unanswerable.

The case of *Krebs Hop Co. v. Livesly*, 114 Pa., 944-

949, practically lays down the same rule as that enunciated by Judge Rudkin in this case.

In this case there was no attempt to prove that Horst had any hops on hand equal to samples 21 to 24, save and except hops of the character of samples 1 to 20 raised by him (pages 365-366).

These samples were never submitted to the Pabst Co., as a compliance with the final contract requiring hops to be equal to samples 21 to 24.

The rejection having taken place on November 4th, and breach accepted by Horst on the next day it became the duty of the Horst Co. to minimize their damages as much as possible from then on.

Consequently all the discussion with reference to custom is purely academic because as they did not have the goods on hand at that time (except their own air dried product which was not tendered) the fluctuations of the market after November 4th in no way affected the principle laid down in the decision in this case, because it would have been their duty to protect themselves by the sale within a reasonable time after the rejection of any hops they then had or subsequently purchased for delivery on this contract.

Moreover, the attempt to inject the element of custom has no evidence to substantiate it. Horst's testimony was practically abandoned by him on cross-examination and all other witnesses testified there was no such custom.

The evidence in this regard was analyzed and speci-

fied at pages 86 to 88 and 169 and 170 of our Brief.

If as a matter of fact these air dried Cosumnes hops were as good as any other hops they could of course have had the benefit of the market within a reasonable time after the breach.

The authorities and text writer quoted by counsel do not refer to conditions like those in this case.

The vital facts in the Livesly case are more nearly like those here. Consequently the measure of damages in the case at bar following the rule of the Livesly decision is as laid down in the opinion in this case.

Counsel find great difficulty in giving unity or consistency to their argument.

They say at page 8, "defendant in submitting samples of hops which it would accept did not confine "itself to hops grown by plaintiff Company, but agreed "to accept any hops equal in quality to the samples "submitted."

This is an acceptance by them of the theory which was attempted to be established by Pabst Company in their proposed finding which was rejected and which is set forth *in extenso* in our opening brief at page 22.

The acceptance of this sample theory as the existing contract between plaintiff and defendant completely eliminates the existence of any agreement as to date of delivery because the data establishing this contract consists of a series of night lettergrams and letters set forth at pages 65, 66, 67 and 69. Nowhere is date of delivery mentioned therein. In the first telegram

Horst Company ask Pabst Company if they will accept deliveries equal to the four samples received by them, saying they would try to purchase the same if Pabst Co. would accept, and adding by a telegram the next day, "if you wire you will accept hops equal samples "you sent we will arrange accumulate such hops for "you." This was replied to by Pabst Company saying, "must see samples Cosumnes deliveries you can make "equal four samples mailed you as we expect to dispose "of same on coast." This was followed by a letter from Pabst to Horst under date of October 23rd, saying:

"There was no specified time mentioned when hops were to be shipped, and the entailed loss you have had up to the present time by holding these hops had nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted the same."

This was followed on October 29th by a letter from Horst to Pabst in which they say, "Received your favor "of the 23rd inst. By special delivery mail we send "you to-day a line of samples numbers 25 to 38 inclusive, equal to which we are ready to make deliveries "to you" (page 325).

The Court will thus observe that the contract referred to by them with reference to submission of samples as set forth at page 6 and page 8 of their petition, has no connection whatsoever with any previous negotiations containing provision as to time of de-

livery, and the Pabst people in their letter of October 23rd, specifically set forth that no specified time was mentioned when the hops were to be delivered and the Horst people when they sent the samples to close the modified contract did not dispute that fact.

Certainly, therefore, there was nothing in the contract itself as finally closed which would modify the ordinary rules with reference to damages being determined at the date of the breach or a reasonable time thereafter.

NINTH: AS TO PABST COMPANY HAVING DIFFERENT THEORY FROM THE RULE LAID DOWN IN THE OPINION.

We certainly announced that theory by the first question we asked witness Horst on cross-examination.

We, as counsel for Pabst, spent 5 pages of our opening brief trying to state it.

It is very difficult to understand how counsel can overlook the argument set forth in our brief at pages 132 to 137. It is still more difficult to understand how counsel can overlook the fact that practically the very first question asked Witness Horst on cross-examination was

Q. What steps, if any, did you take to set aside the 2000 bales for the Pabst people at that time?

The intent of this question was to show that Horst

had abandoned the right to prove the sale price of any hops by failing to set aside hops for Pabst.

We have compiled in our opening brief the several questions that were based upon the theory that all evidence as to sale price of any particular 2000 bales was inadmissible because not ear marked with anything indicating that they belonged to Pabst Company.

At page 81 of our brief we show that they (Horst Co.) did not have 2000 bales on hand. And we add at page 84: "It is our contention that it is error to establish damages by means of proof of which an undefined 2000 bales of hops which did not exist as an entity were sold for by testimony as to sale price of hops used in filling contracts in existence on November 4, 1912," etc.

At pages 84, 85 and 86 we collate the several exceptions to overruling objections to questions based on attempt to prove damages by sale price of an unidentified 2000 bales—which was the negative way (and the only way available to Pabst) to attempt to establish the rule laid down by this Court in this decision.

We respectfully submit that the record itself when taken as a whole abundantly and amply justifies the decision now on file in this case and that the rule laid down herein as to damages is in exact accord with not only the Federal but the State decisions on facts as shown by the entire record.

We respectfully request that the petition for rehearing be denied.

HELLER, POWERS & EHRMAN,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WORTHEN LUMBER MILLS, a Corporation,
Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

Filed

SEP 1 6 1915

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

JOHN RUSTGARD, Juneau, Alaska,
Attorney for Appellant.

Messrs. HELLENTHAL AND HELLENTHAL,
Juneau, Alaska,
Attorneys for Appellee.

*In the District Court for the Territory of Alaska,
Division No. 1, at Juneau.*

Case No. 1020—A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation.

Defendant.

Complaint.

The plaintiff complains of the defendant and alleges:

I.

That the Alaska Juneau Gold Mining Company is a corporation duly organized under the laws of the State of West Virginia, and doing business in the Territory of Alaska, pursuant to a full compliance with the laws of said Territory.

II.

That the Worthen Lumber Mills is a corporation organized under the laws of the State of Washington, and doing business in the Territory of Alaska.

III.

That on and prior to the 15th day of September, 1902, the J. P. Jorgenson Company, a corporation, John Reck, W. W. Casey and W. J. Hills, were the owners in common, each owning an undivided one-fourth interest therein, of two certain lode mining claims, known as the Abe Lincoln and General Grant lode mining claims, which said mining claims were situate, lying, and being on the shore of Gastineau Channel to the south of the patented townsite of the town of Juneau, in the Territory of Alaska, and [1*] are more particularly described in the notices and certificates of location of each of said mining claims which are duly recorded in the office of the recorder for the Juneau Recording District, the same being the territory in which said claims were located, and reference is hereby made to said notices and certificates of location so recorded for a more detailed and perfect description.

IV.

That said two claims, to wit, the Abe Lincoln and General Grant lode mining claims adjoined one another and were grouped and held in common as aforesaid on the date above referred to.

That on the said 15th day of September, 1902, John Reck, W. W. Casey and W. J. Hills, made, executed and delivered to the J. P. Jorgenson Company their certain deed of writing, which said deed was then and there accepted by the said J. P. Jorgenson Company, and the said J. P. Jorgenson Company went into the possession and occupation of the prem-

*Page-number appearing at foot of page of original certified Record.

ises granted thereunder, which said deed is in words and figures as follows: [2]

“This Indenture, made this 15th day of September, in the year of our Lord one thousand nine hundred and two,

Between W. G. Hills, John Reck and W. W. Casey, all of Juneau, Alaska, the parties of the first part, and the J. P. Jorgenson Co. the party of the second part;

Witnesseth: That the said parties of the first part for and in consideration of the sum of One Dollar lawful money of the United States of America, to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, do by these presents, remise, release and forever quitclaim unto the said party of the second part, and to its heirs and assigns all of our right, title and interest in the following described tract, lot or parcel of tide land situated lying and being on Gastineau Channel about 550 feet in a southerly direction from Cor. No. 1 of the Townsite of Juneau in the District of Alaska, particularly bounded and described as follows, to wit:

Beginning at a point at mean high tide 555 feet in a southerly direction from Cor. No. 1 of the townsite of Juneau, Alaska, thence running in a southerly direction along the mean high tide line of Gastineau Channel a distance of 1000 feet, and extending from the said line of mean high tide, to deep water of Gastineau Channel, reserving to said parties of the first part the right of ingress and egress across the dock or roadway of the party of the second part for the

landing of supplies and machinery and *of* for the dumping of refuse from mines on the abutting upland.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part and to its successors and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

W. J. HILLS. (Seal)

JOHN RECK. (Seal)

W. W. CASEY. (Seal)

Signed, sealed and delivered in the presence of

T. R. LYONS.

H. E. WEST.

United States of America,
District of Alaska,—ss.

This certifies that on the 15th day of September, A. D. 1902, before me the undersigned a Notary Public [3] in and for the District of Alaska, duly commissioned and sworn, personally came W. J. Hills, John Reck and W. W. Casey to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and volun-

tary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]

T. R. LYONS,

Notary Public in and for the District of Alaska.

Filed for Record at 2:35 P. M. Sept. 27, 1902.

HIRAM H. FOLSOM,

Recorder.

United States of America,

Territory of Alaska,—ss.

I hereby certify that the foregoing is a true, full, correct and complete copy of the original instrument as the same appears of record in the office of the United States Commissioner, Ex-officio Recorder for the Juneau Recording Precinct, Alaska, in Book 18A of Deeds at page 570.

Witness my hand and official seal this — day of —, 1913.

United States Commissioner and Ex-Officio Recorder for Juneau Recording Precinct. [4]

V.

And that on said 15th day of September, 1902, the said J. P. Jorgenson Company, a corporation, conveyed to W. J. Hills by its certain deed, an undivided one fourth interest to the said Abe Lincoln and General Grant lode mining claims, reserving to itself a certain strip of tide-land 1000 feet long, as referred to in said deed, which said deed so made by the said J. P. Jorgenson to the said W. J. Hills, is in words and figures as follows, to wit: [5]

This Indenture made this 15th day of September, in the year of our Lord one thousand nine hundred and two,

Between the J. P. Jorgenson Company, a corporation, the party of the first part, and W. J. Hills, the party of the second part, Witnesseth: That the said party of the first part for and in consideration of the sum of One Dollar, lawful money of the United States of America, to it in hand paid by the said party of the said party of the second part, the receipt whereof is hereby acknowledged doth by these presents remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns the following described tracts, lots, or parcels of land, situate, lying and being *to* the District of Alaska, particularly bounded and described as follows, to wit:

The undivided one fourth ($\frac{1}{4}$) interest of the party of the first part in and to those certain lode mining claims known and called the Abe Lincoln and General Grant, situate immediately adjoining the town of Juneau, in a southerly direction saving and excepting the land below mean high tide commencing 555.8 feet south of the southerly corner of the town of Juneau on Gastineau Channel and extending 1000 feet in a southerly direction along said Gastineau Channel, however granting to the party of the 2^d part ingress and egress and the right to dump refuse under 1st parties dock and a right across the same.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion

and reversions, remainder and remainders, rents, issues and profits thereof. To Have and to Hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In Witness Whereof the said party of the first part hath caused these presents to be signed by its president and secretary and its corporate seal to be hereto affixed the day and year first above written.

The J. P. JORGENSEN CO., (Seal]

By J. P. JORGENSEN, Pres.

The J. P. JORGENSEN CO., (Seal)

By H. E. WEST, Sec'y.

Signed, sealed and delivered in presence of

T. R. LYONS,

JOHN S. SNYDER,

United States of America,

Territory of Alaska,—ss.

This is to certify, that on this 15th day of September, A. D. 1902, before me, the undersigned a [6] Notary Public in and for the District of Alaska, duly commissioned and sworn, personally came J. P. Jorgenson and H. E. West to me known to be the president and secretary respectively of the J. P. Jorgenson Company, the corporation that executed the within instrument, and acknowledged to me that they executed said instrument for and in behalf of said corporation, and as the act and deed of such corporation.

Witness my hand and official seal, the day and year in this certificate first above written.

[Seal]

T. R. LYONS,

Notary Public in and for the District of Alaska.

Filed for record at 1:30 P. M. Oct. 4th, 1902.

HIRAM H. FOLSOM,

Recorder. [7]

VI.

That by reason of the deeds above referred to, the said J. P. Jorgenson Company, a corporation, estopped itself from disputing the title of the said W. J. Hills, John Reck and W. W. Casey to the above and foregoing Abe Lincoln and General Grant lode mining claims, except as to the 1000 feet of tide-flat conveyed to the said J. P. Jorgenson Company, and reserved to it in its said deed, subject to certain limitations, easements and reservations in said deeds mentioned.

VII.

That on October 23, 1905, W. J. Hills, had by mesne conveyance acquired an undivided three-fourths interest in said Abe Lincoln and General Grant lode mining claims, and did on said date convey said undivided three-fourths interest in said claims to Shattuck and Company, a corporation, and that by deed made on December 26, 1905, said Shattuck and Company did by its deed convey all of its said interest so acquired from said W. J. Hills as well as any other interest it might have at that time in said property to Henry Shattuck.

VIII.

That thereafter on May 1, 1906, the said Henry

Shattuck and Marie Charon Shattuck, his wife, conveyed an undivided one-fourth interest to John Beck in and to said Abe Lincoln and General Grant lode mining claims.

IX.

That thereafter and on the 23d day of August, 1911, the aforesaid John Beck conveyed to the Alaska Juneau Gold Mining Company, a corporation, the plaintiff herein, an undivided one-half interest in and to the said Abe Lincoln and General Grant lode mining claims. [8]

X.

That on or about the said 23d day of August, 1911, the aforesaid Henry Shattuck did by deed convey to the Alaska Juneau Gold Mining Company, the plaintiff herein, all his right, title and interest in and to the above-described General Grant lode mining claim, consisting of an undivided one-half interest in and to said lode mining claims.

XI.

That on October 31, 1912, the said Henry Shattuck conveyed to the said Alaska Juneau Gold Mining Company, a corporation, the plaintiff herein, all his right, title and interest consisting of an undivided one-half interest in and to the Abe Lincoln lode mining claim, except that the said Henry Shattuck reserved in said deed of conveyance certain rights in what is known as the Shattuck Wharf, situate in front of said Abe Lincoln mining claim, which said reservations are not material to this controversy and are therefore not specifically set forth.

XII.

That the name of the said J. P. Jorgenson Company was changed to the Alaska Supply Company, and that at the time of the conveyances above referred to by Henry Shattuck to the plaintiff herein, said Henry Shattuck owned approximately one-half of the stock of the said Alaska Supply Company and was president and manager thereof.

XIII.

That thereafter and after the said conveyances were made to the said plaintiff company by the said Henry Shattuck and the said John Reck, the defendant, the Worthen Lumber Mills, became the successor in interest of the J. P. Jorgenson Company. [9]

XIV.

That at the time the property rights of the said J. P. Jorgenson Company were conveyed to the said Worthen Lumber Mills all of the deeds of conveyance and other instruments of title above referred to were all recorded in the office of the Recorder for the Juneau Recording District, and the said Worthen Lumber Mills had a full and complete notice thereof; and further, the Worthen Lumber Mills had actual knowledge of the relation between Henry Shattuck and the Alaska Supply Company and the connection of the said Henry Shattuck with said company.

XV.

That by reason of the matters and things above set out the said Worthen Lumber Mills are estopped from claiming any right, title and interest in and to the General Grant and Abe Lincoln lode mining claims, save and except as the 1000 feet of the tide-

lands lying in front of said claims originally granted to the J. P. Jorgenson Company, subject to the reservations expressed and referred to in the deed above described and set forth.

XVI.

That the said Abe Lincoln and General Grant lode mining claims lie on the shore of Gastineau Channel, a navigable body of water, and as such shore lands had and have appurtenant thereto all the littoral rights possessed by lands lying on the shores of navigable waters. [10]

XVII.

That the plaintiff herein, the Alaska Juneau Gold Mining Company, is now the owner and holder of said Abe Lincoln and General Grant lode mining claims, under and by virtue of the conveyances above referred to.

XVIII.

That the plaintiff, the Alaska Juneau Gold Mining Company, is now the owner and holder and in the possession of a certain group of millsites, situate on the shore of Gastineau Channel and covering approximately the same ground embraced within the limits of the Abe Lincoln and General Grant lode mining claim above described; which said millsites are known as: "A" millsite; "B" millsite; "C" millsite; "D" millsite; "E" millsite; "F" millsite; "G" millsite; "H" millsite; "L" millsite; "T" millsite; "P" millsite; "M" millsite; "U" millsite; "X" millsite; and "Z" millsite; and are more particularly described in the notices of location of said millsites, which have been duly recorded in the office of the

Recorder for the Juneau Recording District, Territory of Alaska, and such notices are to be regarded as incorporated herein and set out in full for the purpose of a more accurate and complete description of said millsites; said group of millsites so owned and held by the plaintiff company borders on the shore of Gastineau Channel, a navigable arm of water, and as the owner of said group of millsites, the plaintiff company is entitled to all littoral and riparian rights appurtenant thereto, by reason of the fact that said millsites border upon the shore of Gastineau Channel as aforesaid. [11]

XIX.

That certain portions of the ground embraced within the Abe Lincoln and General Grant lode mining claims, and embraced within the boundaries of the millsites above referred to were occupied by Indians and others on the 17th day of May, 1884;

That all the right, title and interest of the Indians and others so occupying said ground has been purchased by the plaintiff company, which is now the owner and holder thereof;

That two tracts of ground so purchased from Indians in possession thereof on the 17th day of May, 1884, are material to this controversy and are as follows: One of said tracts was owned, claimed and occupied by the grantors and predecessors in interest of Jimmie Bean, prior to May 17, 1884, and is described as follows:

“Commencing at Cor. No. 1 of the Abe Lincoln lode mining claim U. S. Survey #597 which is identical with Cor. No. 4 of the General Grant

lode mining claim U. S. Survey #597, from which U. S. L. M. No. 1 bears S. $17^{\circ} 02'$ E. 6851.7 ft; thence S. $33^{\circ} 34'$ E. 106.5 ft; thence S. $45^{\circ} 31'$ E. 378.2 ft; thence N. $54^{\circ} 39'$ E. 150 ft; thence N. $39^{\circ} 43'$ W. 533.59 ft; thence S. $58^{\circ} 51'$ W. 150 ft; thence S. $31^{\circ} 09'$ E. 138 ft; to point of beginning."

This tract is known as the cemetery tract.

Which said tract of ground so described and occupied as aforesaid and the whole thereof was claimed, occupied and used by the said Jimmie Bean, his grantors and predecessors in interest, and the beach lying in front thereof was used by him, his grantors and predecessors in interest and others with his consent for the purpose of landing canoes and other water craft in going to and from said tract of ground, all of which use and occupation dates back to May 17, 1884; [12]

That on the 30th day of April, A. D. 1913, the said Jimmie Bean acting as an individual and as chief of the Taku Tribe of Natives, and Mrs. Sallie Bean, formerly the wife of Chief Johnson, upon a good and sufficient consideration of \$400.00 to them in hand paid did by deed of conveyance convey to the plaintiff company all of said tract and the whole thereof so described and occupied by them together with the right of ingress and egress to and from deep water, and all and singular the appurtenances and littoral rights thereunto belonging.

XX.

That the said Alaska Juneau Gold Mining Company, a corporation, the plaintiff herein, is now the

owner and holder of said tract.

XXI.

That an Indian by the name of Johnson occupied, possessed and claimed a certain tract of land described and situated on the shore of Gastineau Channel and within the boundaries of what is above described as the Abe Lincoln and General Grant group of mining claims, and is more particularly described as follows, to wit:

“Commencing at a point on the meander line of Gastineau Channel from which Cor. No. 6 of the General Grant lode, W. S. Survey No. 597, as surveyed for patent, bears N. 20° 26' W. 9.8 ft. thence N. 57° 7' E. 108 ft; thence N. 20° 26' W. 10.4 ft; thence N. 45° 31' W. 79.3 ft; thence S. 54° 39' W. 106.7 ft. to mean high tide line of Gastineau Channel; thence S. 45° 31' E. 74.5 ft. to said Cor. No. 6 General Grant lode; thence S. 20° 26' E. 9.8 ft. to place of beginning.

Together with the right of ingress and egress to and from deep water and the littoral rights.”

That said tract and the whole thereof was occupied, possessed and claimed by the said Indian named Johnson on the 17th day of May, 1884, and prior thereto. [13]

That said tract so described borders on the shore of Gastineau Channel, a navigable body of water, to the extent delineated upon the map hereto attached; and that the tide-lands lying in front of said tract of land and the whole and every part thereof were used by said Indian named Johnson claimed and occupied by him on the 17th day of May, 1884, for the

purpose of furnishing him ingress and egress to and from his said upland and for the purpose of landing canoes and other water craft thereon;

That for and in consideration of the sum of \$710.00, the plaintiff, the Alaska Juneau Gold Mining Company, acquired and became possessed of by mesne conveyance all the right, title and interest of the said Indian named Johnson in and to the tract of ground above described, as well as the tide-lands lying in front thereof and claimed and occupied as above set forth.

XXII.

That the said Alaska Juneau Gold Mining Company, a corporation, the plaintiff herein, is now the owner and holder of said tract of ground above described as having been occupied by the said Johnson, an Indian, and claimed by him as well as the littoral rights appertenant thereto. [14]

XXIII.

That the plaintiff, the Alaska Juneau Gold Mining Company, is engaged in the business of mining; is the owner of a large group of quartz claims both patented and unpatented situate in and near Silver Bos Basin a short distance from the town of Juneau, Alaska;

That said group of claims contains large low-grade ore bodies; that owing to the low-grade character of the ores the same cannot be mined and milled at a profit unless the operations be carried on on a large scale and a milling plant be situated on salt water so as to be able to carry on operations the year round and enjoy the other advantages that arise from hav-

ing the plant situated on a navigable body of water.

That the plaintiff company has for some time past been working on a plan of operation which involves the construction of a large milling plant having a capacity of approximately 12,000 tons per day, which plant is to be constructed on the premises above described, as included within said Abe Lincoln and General Grant lode claims, said millsites and the said tracts purchased from Indians and others.

That in order to carry out its said plan of operation it has driven approximately two miles of tunnel to connect its said milling plant with its said mines at an expense of approximately one half million dollars; which said tunnel has been connected by means of trestles and other contrivances so as to furnish a route for the conveyance of ores from its said mines to its said proposed milling plant, and for the purpose of conveying water to be used for water-power and other uses in connection with the operation of its said plant; [15]

That in order to carry out its said plan it has taken possession of all and singular the ground included within the Abe Lincoln and General Grant lode mining claims, said millsites, said Indian tracts, and has spent large sums in excavating thereon and in making preparations for the construction of said milling plant; all of which said work is now being actively carried on on the whole of and every part of said tract and tracts so occupied and possessed by the plaintiff company;

That is has already constructed a large wharf for the purpose of landing, milling and mining supplies,

and will in the near future be obliged to construct other similar wharves for the purpose of conveniently land supplies, coal and fuel oil, for its power plant, which will be constructed at the point on the tract of land so occupied by it indicated on the plat hereto attached, the same being in part at least on and in the neighborhood of the tracts so above described as having been purchased from the Indians.

XXIV.

That the plaintiff company now is and for some time past has been actively engaged in filling in the tide-lands in front of the point where the said power plant is to be constructed, and that in order to successfully operate said power plant it is necessary that it have access to deep water for the purpose of landing its fuel oil and other supplies in connection with the operation of its said power plant, and also for the purpose of obtaining salt water for condensing purpose for use in connection with its said power plant, as well as for the purpose [16] of having a waste way from its water-wheel plant which will constitute part of its said power plant;

That the natural conditions that obtain on the ground above described as being occupied and used by the plaintiff company for millsite purposes as above stated are such owing to snowslides, rock slides and other interferences that occur on certain portions thereof that the buildings including the mill buildings, power plant and other buildings can only be located at certain fixed points, to insure the safety of the plant; and that it is necessary because of such natural conditions that the plan adopted by the plain-

tiff company with reference to the construction of its buildings the location of the various portions of the plant be followed in detail;

That the tracts of ground above described as being included within the Abe Lincoln and General Grant group of mining claims, as being included within the group of millsites above referred to, and as being included within the Indian tracts above referred to, as well as the plan in connection with the construction of the milling plant above referred to are accurately delineated and set out upon the plat hereto attached and made a part hereof;

XXV.

That the J. P. Jorgenson Company constructed a sawmill upon the tide-flats conveyed to it by the plaintiff's grantors and reserved to it in its conveyance to the plaintiff's grantors of the Abe Lincoln and General Grant lode mining claims, the same being the tract of land extending for 1000 feet along the [17] shore of Gastneau Channel in front of said Abe Lincoln and General Grant lode mining claims, as shown upon the plat hereto attached, and as described in the deeds of conveyance herein set forth;

That by reason of said conveyance and reservation therein contained, the plaintiff's grantors reserved to themselves the right to dump tailings upon said 1000 feet of shore land and as well as the right of ingress and egress across the same as shown by the reservation contained in said deeds above referred to.

XXVI.

That the name of the said J. P. Jorgenson Com-

pany was afterward changed to the Alaska Supply Company, of which the said Henry Shattuck, as above referred to, was one of the principal stockholders as well as president and general manager;

That at the time the said Shattuck occupied such position with the said Alaska Supply Company, he made the conveyance to the plaintiff company, above referred to, and his interest in the said Abe Lincoln and General Grant mining claims upon the consideration above referred to, the total sum paid said Shattuck being \$2,500.00;

That said Alaska Supply Company continued to operate said sawmill and continued to use said 1000 feet for said sawmill purposes, a portion thereof being applied to the construction of the sawmill itself, a portion thereof for the purpose of constructing a wharf and the remainder for use as a log boom;
[18]

XXVII.

That on the 24th day of March, 1913, the defendant company became the successor in interest of the said Alaska Supply Company to said sawmill and plant including the right to occupy the said 1000 feet of shore land in front of said Abe Lincoln and General Grant lode mining claims;

That on the 28th day of June, 1913, while the plaintiff company was engaged in making excavations with a view of preparing the ground for the construction of its said milling plant on the ground occupied by it and above the strip occupied by the defendant company, being 1000 feet in extent as above stated, an action was commenced against the plaintiff com-

pany by the said defendant company with a view of enjoining it from permitting its waste material to escape on the beach in front of its said ground; that the Court issued a temporary injunction enjoining the plaintiff company from dumping solid material on its said ground pending action;

That thereafter, and on or about the 14th day of July, 1913, the said Worthen Lumber Mills commenced another and further action against the plaintiff, the Alaska Juneau Gold Mining Company, with a view of enjoining it from driving piles in front of its said above-described tract of ground owned and occupied by it for the uses and purposes aforesaid, which said piles were driven for the purpose of placing structures thereon for use in connection with its said operations as shown on the plat attached hereto; that the Court issued a restraining order in said action pending the time within which a hearing for a temporary injunction could be had, which has not yet been had. [19]

XXVIII.

That after said restraining orders had been issued and while the hands of the plaintiff company were tied by reason thereof, the defendant company did clandestinely and on Sunday, an unjudicial day, to wit, the 3d day of August, 1913, commence the construction of a long and narrow platform extending beyond and to the south of the 1000 feet strip of tideland owned and occupied by it under and by virtue of the conveyance and reservation above referred to, and in front of the ground claimed, owned and occupied by the plaintiff company as above set forth;

said platform as the same is being constructed has a width of approximately fifteen feet and extends for approximately 400 feet along the shore beyond the 1000 feet owned and occupied by the defendant company, and in front of the ground claimed, owned and occupied by the plaintiff company;

That said platform was commenced and was in course of construction while the plaintiff company was actually engaged in filling in the tide-flats in front of which and across which said platform is being constructed;

That immediately after the construction work of said platform was commenced the defendant company was notified of the fact that they were beyond their own lines and were constructing a platform in front of the plaintiff's ground and in such manner as to cut off the plaintiff's right of ingress and egress to and from deep water, and were told to discontinue work in connection therewith;

That notwithstanding the notice so given it, that notwithstanding the warning given it the defendant company continued [20] its said work and threatens to complete its said platform across said entire distance of about 400 feet and will complete the same unless prevented by an order of this Court;

And, further, that while the plaintiff was restrained and enjoined as above set forth the defendant company went in and upon the premises and wilfully destroyed and tore out piles having been previously placed there by the defendant company;

That said platform above described extends in front of and across the tract of ground on which the

power plant of the plaintiff company is being constructed as above referred to, and will if completed and permitted to remain in that position cut off the plaintiff's right of ingress and egress to deep water and prevent the plaintiff from landing coal oil and other supplies at that point in connection with its power plant, and also prevent the plaintiff from procuring salt water for use in connection with the operation of its power plant, and effectually prevent the plaintiff from having a waste way for its waste water from its power plant to Gastineau Channel;

That the maintenance and construction of said platform by the defendant company along the shore of Gastineau Channel at the point above referred to in the manner above referred to will destroy the

(As per
order of
Court Jan.
29-1915.)—
O. Z. D.
Dep. Clerk.

value of the plaintiff's property, will cut off plaintiff's access from its uplands above described to the navigable waters of Gastineau Channel for the entire distance that such platform extends along in front of the same, will render it impossible for the plaintiff company to maintain its power plant at said point which is the only practical point for the maintenance of the same, and will cause the plaintiff company irreparable damage and loss which cannot be [21] compensated in money, because of the fact that it will disarrange the plans of the plaintiff company, interfere with the construction of its milling plant to an extent that cannot be calculated, because of the physical conditions that obtain on the ground; will delay the plaintiff in getting its plant completed so as to enable it to mill its

ores and will actually interfere with the mining and milling of the ores of the plaintiff so as to deprive the plaintiff of profits that it would derive therefrom.

WHEREFORE the plaintiff prays:

That the rights of the respective parties herein be adjudicated by the Court and a decree be entered herein defining the rights of each;

That the Court issue a mandatory injunction commanding the defendant company to remove any and all structures placed and maintained by them in front of the ground occupied and used by the plaintiff and owned by it as aforesaid, except such portion as is included within the 1,000 feet of tide-lands granted to and reserved to the defendant company;

And that the Court issue a temporary restraining order enjoining the defendant from driving piles or constructing structures in front of the lands owned and occupied by the plaintiff as aforesaid, except the 1,000 feet above referred to and that said temporary restraining order be made permanent [22] upon the hearing of this cause, and for such other and further relief as to the Court may seem just and equitable.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff. [23]

United States of America,
Territory of Alaska,—ss.

R. A. Kenzie, being first duly sworn, on oath, says: That I am the General Supt. of the plaintiff corporation in the above-entitled action; that I have read the foregoing complaint and know the contents

thereof and believe the same to be true.

[Seal]

R. A. KINZIE.

Subscribed and sworn to before me this 5th day of August, A. D. 1913.

[Notarial Seal]

SIMON HELLENTHAL,

Notary Public for Alaska.

My Commission expires Nov. 29, 1913.

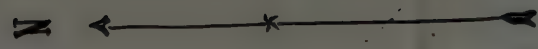
[Endorsed]: No. ——. In the District Court for the Territory of Alaska, Division No. 1. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. Worthen Lumber Mills, a Corporation, Defendant. Complaint.

Due service by copy of the within admitted this 5th day of August, 1913.

SHACKLEFORD & BAYLESS,

Attorneys for Plaintiff,

Defendant. [24]



*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020—A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Answer.

Comes now the defendant and for its answer to plaintiff's complaint herein shows to this Court:

I.

Defendant admits the allegations in paragraph I of plaintiff's complaint set out.

II.

Defendant admits that it is a corporation, as alleged in paragraph II of the complaint herein, and alleges that it has paid its annual license fee last due, under and pursuant to the provisions of Chapter 11 of the Territorial laws of Alaska for the year 1913.

III.

Defendant admits the various allegations set out in paragraphs III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, and XVII of the complaint, except as said allegations are hereinafter denied.

IV.

Defendant denies the allegations set out in para-

graph XVI of the complaint. [26]

V.

As to the allegations set out in paragraph XVIII of plaintiff's complaint defendant has not knowledge sufficient to form a belief, and therefore denies the same, and denies positively that by reason of such alleged millsites mentioned in said paragraph XVIII or otherwise plaintiff has, holds or is entitled to any littoral or riparian rights in or over the shores or waters of Gastineau Channel or over any of the premises now in the possession of defendant.

VI.

As to the allegations set out in paragraphs XIX, XX, XXI and XXII of the complaint, defendant has not knowledge sufficient to form a belief, and therefore denies the same, and denies positively that any of the tracts of land described in plaintiff's complaint and therein alleged to belong to it borders on Gastineau Channel or upon the tide waters thereof, and denies that, by reason of any ownership of such tracts of land, plaintiff has, holds or is entitled to any littoral rights in or over the waters of Gastineau Channel.

VII.

As to the allegations set out in paragraph XXIII of the complaint, defendant has not knowledge sufficient to form a belief, and therefore denies the same; and denies positively that plaintiff has taken possession of or placed any improvements upon the premises in the possession of defendant or herein-after alleged to belong to or be in the possession of defendant, except that plaintiff has unlawfully and

in violation of the injunction issued in cause No. 1010-A in this court, sluiced silt and other debris over portions of such premises. [27]

VIII.

Defendant denies the allegations set out in paragraph XXIV of plaintiff's complaint, but admits that plaintiff has sluiced various silt and other debris over some of the premises in question, and avers that the same has been done unlawfully, without authority in law, and in violation of the injunction in cause No. 1010-A of this court.

IX.

Defendant denies the allegations set out in paragraph XXV of plaintiff's complaint, except that defendant admits that the J. P. Jorgenson Company constructed a sawmill upon the tide-flats conveyed to it by plaintiff's grantors and reserved to it in its conveyance to the plaintiff's grantors of the Abe Lincoln and General Grant lode mining claims, and alleges that part of said sawmill plant is situated on high land above mean high tide.

X.

Answering the allegations set out in paragraph XXVI of plaintiff's complaint, defendant admits the same, except to the extent that such allegations are denied or modified in other parts of this answer.

XI.

Answering the allegations in paragraph XXVII of the plaintiffs' complaint set out, the defendant admits the same, except to the extent that said allegations are denied or modified in other parts of this answer.

XII.

Answering the allegations set out in paragraphs XXVIII of plaintiff's complaint, defendant denies the same, except to the extent that such allegations are admitted or qualified in other parts of this answer. [28]

XIII.

For a further answer and defense *defense* defendant alleges that it is the owner of a sawmill plant situated within the town of Juneau, partly on upland and partly on land below mean high tide, on the northeasterly shore of Gastineau Channel, the greater portion of said sawmill plant being situated on the northerly portion of a tract of land extending from a point 701.31 feet southerly from corner No. 1 of the patented townsite of Juneau for a distance of 1300 feet southerly along the northeasterly shore of Gastineau Channel, that the southerly end of said tract for a distance of some 700 or 800 feet is used by defendant as and for a log boom or booming ground in connection with said sawmill and that it is absolutely indispensable to the enjoyment of its said property by defendant that the navigable waters of Gastineau Channel southerly from said sawmill plant and along the said northeast shore be kept open and free from obstruction in order that the defendant may be able to float its rafts of logs into said log boom; that the said sawmill plant has been in existence and been operated by defendant and its predecessor in interest some ten or twelve years last past; that a street and public highway and thoroughfare twenty feet wide, known as Franklin

Street also referred to as Lower Franklin, extends along the line of mean high tide on the northeast shore of Gastineau Channel past the premises described in plaintiff's complaint as the properties of said plaintiff; that said street has been duly, properly and lawfully laid out and established and has been used as a public highway for more than ten years last past, is now so used, and the said street intervenes between the navigable waters of Gastineau Channel and the various tracts of land claimed by plaintiff in its complaint. [29]

XIV.

That defendant herein and its predecessor in interest for several years last past have been, and defendant now is, in peaceable, lawful and exclusive possession of the strip of land adjoining said street on the southwest or seaward side thereof, which strip is approximately 25 feet wide and extends about 400 feet in a southerly direction from the southerly end of the said 1000-foot reserve referred to and known as the Jorgenson reservation; described in plaintiff's complaint; and that on the 28th day of June, 1913, the defendant herein, while in such possession, proceeded to lay a plank platform over said strip for the purpose of using the same as a storage place for lumber manufactured at said sawmill, and the said strip of ground and platform are necessary to defendant for such purpose.

XV.

That said strip of ground is a part of the navigable waters of Gastineau Channel; that no land or premises belonging to plaintiff or anyone else inter-

venes between said strip and said public street, and that plaintiff has no right, riparian, littoral or otherwise, in said premises, nor is plaintiff in any manner injured in any of its rights by reason of said occupancy of said premises by defendant.

XVI.

That in the execution of the deed, a copy of which is set out in paragraph IV of plaintiff's complaint, an error occurs, in this, that at the time the said deed was executed it was the purpose and the intent of all the parties to said deed to describe the premises therein conveyed as beginning at a point at mean high tide 707.31 feet in a southerly direction [30] from corner No. 1 of the townsite of Juneau, Alaska, but that, by mutual inadvertence and mistake, said point was described as situated 555 feet in a southerly direction from corner No. 1 of the townsite of Juneau; that said error in said deed was unknown to this defendant till the complaint herein was served upon it; but that the defendant and its predecessor in interest have ever since the execution of said deed been in actual occupancy and possession of the premises intended to be described, as the plaintiff at all times well knew; and the plaintiff at all times well knew that the defendant and its predecessor in interest claimed the ownership of said premises so occupied by them.

XVII.

That an error occurs in the deed, a copy of which is set out in paragraph V of plaintiff's complaint, in this, that at the time of the execution of said deed it was the purpose and intent of the parties to said

deed to describe the reservation in said deed as commencing at a point 701.31 feet southerly from corner No. 1 of the townsite of Juneau, but that, by mutual inadvertence and mistake, such point was described as situated 555.8 feet south of the southerly corner of the town of Juneau.

WHEREFORE, defendant prays that the plaintiff take nothing by this action; that the temporary restraining order heretofore granted in this cause be dissolved; that that certain deed, a copy of which is set out in paragraph IV of plaintiff's complaint, be reformed so that the premises conveyed by said deed be described as beginning at a point [31] at mean high tide 701.31 feet in a southerly direction from corner No. 1 of the townsite of Juneau, instead of at a point 555 feet in a southerly direction from said corner; that that certain deed, a copy of which is set out in paragraph V of plaintiff's complaint be so reformed that the reservation therein be described as commencing at a point 701.31 feet in a southerly direction from corner No. 1 of the townsite of Juneau, instead of at a point 555.8 feet south of the southerly corner of the town of Juneau; that defendant have its costs and disbursements herein.

JOHN RUSTGARD,

Attorney for Defendant. [32]

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn on oath, says: That he is the President of Worthen Lumber Mills, the defendant in the above-entitled action;

that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

(Sgd.) H. S. WORTHEN.

Subscribed and sworn to before me this 12th day of Sept. 1914.

[Notarial Seal] (Sgd.) GUY McNAUGHTON,
Notary Public for the Territory of Alaska, Residing
at Juneau.

My commission expires on the 25th day of October, 1916.

Copy of within answer received and due service of same acknowledged this 14th day of September, 1914.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Sept. 14, 1914. J. W. Bell, Clerk. By C. Z. Denny, Deputy. No. 1020-A. In the District Court, Division No. 1, Territory of Alaska. Alaska Juneau Gold Mining Company, a Corporation, vs. Worthen Lumber Mills, a Corporation, Defendant. Answer. John Rustgard, Attorney for Defendant. [33]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

Case No. 1020-A.

ALASKA JUNEAU MINING COMPANY, a Cor-
poration,

Plaintiff,

vs.

WORTHEN LUMBER MILLS,

Defendant.

Reply.

Comes now the plaintiff and for reply to the defendant's answer herein, admits, denies and alleges as follows:

I.

Referring to paragraphs seven and eight of the defendant's answer, the plaintiff denies that the premises, or any part thereof, referred to in said paragraphs, or either of them, are, or ever were, in the possession of the defendant, or, are or ever were the property of the defendant. And further denies that it deposited silt, debris or anything else on said property in violation of any injunction as herein referred to or otherwise, except in the exercise of its lawful rights.

II.

Referring to paragraph nine of the defendant's answer, the plaintiff denies that any part of the sawmill plant, constructed by the J. P. Jorgenson Company, is situated on high land above the mean high tide.

III.

Referring to the allegations contained in paragraph thirteen of the defendant's answer, the plaintiff admits that [34] the defendant is the owner of and in the possession of a sawmill plant, situate on the tide-flats along the shore of Gastineau Channel, but denies that said sawmill plant occupies the premises referred to in said paragraph and designated as the premises occupied by it, or any part thereof, except as alleged in the complaint. In this connection the plaintiff avers that all the ground now occupied by said sawmill or log boom, or ever occupied by said sawmill or log boom, is embraced within the thousand-foot reservation described in the complaint herein, and that no part thereof extends to the south of or beyond the southerly end of a tract one thousand feet in extent, commencing at a point 555.8 feet southerly of the southerly corner of the townsite of Juneau.

IV.

Plaintiff further denies that it is absolutely indispensable, or at all indispensable, to the enjoyment of the property of the defendant by the defendant, that the navigable waters of Gastineau Channel southerly from said sawmill plant and along the northeast shore or otherwise, or at all, be kept open and free from obstruction in order that the defendant may be able to float its rafts of logs into said log boom or otherwise.

V.

The plaintiff further denies that a street or public highway, or either, or a thoroughfare twenty feet

wide, or any other kind of thoroughfare, known as Franklin Street, Lower Franklin, or any other street, extends along the line of mean high tide on the northeast shore of Gastineau Channel [35] past the premises of the plaintiff, described in the complaint as the property of the plaintiff. The plaintiff further denies that any such street has been duly, properly or lawfully laid out or established,

VI.

The plaintiff denies that any such street or thoroughfare has been used as a public thoroughfare for more than ten years last past, or at all, except as hereinafter expressly referred to, and also that the same is now so used, except as herein described.

VII.

The plaintiff also denies that said street or any street intervenes between the navigable waters of Gastineau Channel and the various tracts of land, or any of them, claimed by the plaintiff in its complaint. And in this connection the plaintiff further avers:

That during the summer of 1912, the City of Juneau constructed a plank driveway twenty feet wide over the tide-lands belonging to the plaintiff, and referred to in the plaintiff's complaint; that said driveway is not constructed along the line of mean high tide, but is constructed over the tide-flats a long distance to seaward from said line of mean high tide, and situated on piles driven and maintained for that purpose; that the construction and maintenance of said street by the city was unlawful and was done without any authority whatsoever from the plain-

tiff, and while the plaintiff was the owner of and in the possession of the uplands described [36] in the plaintiff's complaint, and further that said driveway as so constructed by the city does not cut the plaintiff's said land, or any part thereof, off from tide water, but is built a considerable distance to seaward and below the line of mean high tide and is so situated that the upper side of said street (referring to the side nearest the shore) is approximately from one hundred to one hundred fifty feet to seaward from the line of mean high tide. In this connection the plaintiff further avers that said driveway as built and maintained by the city is so built and maintained as not to interfere with the plaintiff in its exercise of its littoral rights and does not interfere with the plaintiff's access to deep water from its said uplands; that because of the fact that said driveway has always been so maintained as not to interfere with plaintiff's right in this behalf and so as not to prevent plaintiff from freely going over and across the same, or otherwise from exercising its right of ingress and egress to and from the navigable waters of Gastineau Channel, the plaintiff has had no right of action against the city to compel the removal of said street although the same was constructed without any license from the plaintiff or without any right to construct the same.

VIII.

Referring to the allegations contained in paragraph fourteen of defendant's answer, the plaintiff denies that the defendant now is, or ever has been, in the peaceful, lawful or exclusive possession, or

at all, of the strip of land adjoining the street therein referred to on the southwest or seaward side thereof, or at all, plaintiff denies that [37] defendant has been in possession of a strip twenty-five feet in width extending about four hundred feet in a southeasterly direction from the southerly end of the said thousand-foot reservation, referred to as the Jorgenson Reservation, or that it has been in possession of any part or parcel of any such strip, and denies that the defendant has been in possession of any tide-lands, uplands or other property situate to the south of the southerly end of said Jorgenson Reservation, and denies that the platform which the defendant sought to construct over and across the tide-lands of the plaintiff in such a manner as to cut off the plaintiff's access to and from deep water, is necessary to the defendant for the purpose stated, or for any purpose.

IX.

Referring to the allegations contained in paragraph sixteen of the defendant's answer, the plaintiff denies each and every allegation in said paragraph contained, and avers that the deed in said paragraph referred to was executed in accordance with, and expressed, the intention of the parties at the time, and that no mistake occurred therein, and further that the defendant is not entitled to have said deed corrected if a mistake occurred therein, because of the fact that such relief is and would be barred by reason of the defendant's laches, and by reason of the fact that more than ten years have elapsed between the time said deed was executed

and recorded and the time of the filing of the answer herein, and in this connection the plaintiff further alleges:

That it purchased the property described in said [38] deed from the parties and in the manner alleged in the complaint and that at that time it had no knowledge of any such mistake, if any such mistake had ever occurred; that said deed was recorded and is part of the records of the Juneau Recording District, and that relying upon the verity of said records and the correctness of said deed as so recorded, it did, without any notice of any mistake or error, purchase the property therein described and paid value therefor, and that in this regard the plaintiff is and was an innocent purchaser for value without notice.

That by reason of the fact that said deed was so kept upon the records by the defendant and allowed to remain there, and the further fact that the plaintiff, relying upon the correctness of said description as contained in said deed, bought said property in the manner alleged in the complaint without any knowledge of any defect or error in said description, the defendant is now estopped from urging any such errors against the plaintiff even though such error might have existed.

X.

Referring to the allegations contained in paragraph seventeen of the defendant's answer, the plaintiff denies each and every allegation in said paragraph contained, and avers that the deed in said paragraph referred to was executed in accordance

with, and expressed, the intention of the parties at the time, and that no mistake occurred therein, and further that the defendant is not entitled to have said deed corrected if a mistake occurred therein, because of the fact that such relief is and would be barred by [39] reason of the defendant's laches, and by reason of the fact that more than ten years have elapsed between the time said deed was executed and recorded and the time of the filing of the answer herein, and in this connection the plaintiff further alleges:

That it purchased the property described in said deed from the parties and in the manner alleged in the complaint and that at that time it had no knowledge of any such mistake, if any such mistake had ever occurred; that said deed was recorded and is part of the records of the Juneau Recording District, and that relying upon the verity of said records and the correctness of said deed as so recorded, it did, without any notice of any mistake or error, purchase the property therein described and paid value therefor, and that in this regard the plaintiff is and was an innocent purchaser for value without notice.

That by reason of the fact that said deed was so kept upon the records by the defendant and allowed to remain there, and the further fact that the plaintiff, relying upon the correctness of said description as contained in said deed, bought said property in the manner alleged in the complaint without any knowledge of any defect or error in said description, the defendant is now estopped from urging any such errors against the plaintiff even though such error

might have existed.

WHEREFORE, the plaintiff prays that the defendant be denied any of the relief sought, and that the plaintiff have the relief prayed for in its complaint, together with its costs and disbursements in this behalf incurred.

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff. [40]

United States of America,

Territory of Alaska,—ss.

P. R. Bradley, being first duly sworn, on oath says: That I am the General Superintendent of the Alaska Juneau Gold Mining Company, plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof and believe the same to be true.

P. R. BRADLEY.

Subscribed and sworn to before me this fourteenth day of April, A. D. 1915.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service by copy of the within admitted this 14th day of April, 1915.

JOHN RUSTGARD,
Attorney for Defendant.

[Endorsed]: No. 1020-A. In the District Court for the Territory of Alaska, Division No. 1. Alaska Juneau Gold Mining Company, Plaintiff, vs. Worthen Lumber Mills, Defendant. Reply. Filed in the District Court, District of Alaska, First Di-

vision. Apr. 15, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [41]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came on duly to be tried on the complaint as amended by interlineation, answer and reply, on the 15th day of April, 1915; plaintiff appeared by Messrs. Hellenthal and Hellenthal, its counsel, and defendant by Mr. John Rustard, its counsel. Evidence was introduced on behalf of both sides to the controversy, and said evidence having been concluded and the arguments of counsel having been heard, the Court took the matter under advisement and does now make from the evidence the following:

FINDINGS OF FACT.

I.

That at the time of the filing of the complaint herein, and of the doing of the things complained of in said complaint, both plaintiff and defendant were and now are corporations duly organized and au-

thorized to do business in the District of Alaska by virtue of having complied with all the laws of the said District.

II.

That on the 23d day of August, 1911, plaintiff became, and at all times since has been, the owner and in possession and entitled to the possession of those two mining claims, situated on [42] Gastineau Channel, a navigable arm of the North Pacific Ocean, near the city of Juneau, known as the Abe Lincoln and General Grant; said claims were and are the upland upon which abuts the tide-land involved in this litigation. That said tide-land is shoal water, lying immediately between said upland and the navigable waters of said Gastineau Channel.

III.

That at all of said times plaintiff was the owner and holder of and in possession of a certain group of millsites lying contiguous to each other and covering approximately the ground embraced within the limits of said lode mining claims, which said millsites were known as A, B, C, D, E, F, G, H, L, T, P, M, U, X and Z respectively; that millsites A and U above referred to immediately abut on the tide-land in dispute in this case.

IV.

That on and prior to May 17, 1884, and from that date continuously, the upland immediately abutting upon the tide-land in dispute herein was also claimed and occupied by Indians who claimed, occupied and used the same, together with the tide-land in front thereof, as a place of residence and as a place for

landing and hauling up of canoes and for other purposes; and that at the time of the doing of the things complained of in this suit plaintiff had acquired by purchase all of the right, title, interest and claim of the said Indians in and to said upland and said tide-land, and is now the owner of said rights.

V.

That the plaintiff is engaged in the business of mining; is the owner of a large group of quartz claims, both patented and unpatented, situate near Silver Bow Basin, a short distance from [43] the town of Juneau, Alaska.

That in connection with the operation of said mines, the plaintiff is building a large milling plant upon the premises embraced within the said Abe Lincoln and General Grant lode claims and said mill-sites and the tracts purchased, as aforesaid, from the said Indians; that in the work of constructing said milling plant and other work incident thereto, the plaintiff has already expended a sum in excess of one million dollars, and has raised a further sum of approximately four million dollars to be expended in that connection.

That in order to successfully carry on its said work of construction, it is necessary that plaintiff have access to the deep waters of Gastineau Channel and that wharves be built from the upland to said deep water for the purpose of facilitating said access and enabling it to land its construction material and convey the same to the point where said milling plant is being constructed, and that such access is also necessary for the purpose of supplying

its power plant, to be constructed on the shore at a point above the premises in dispute, with fuel oil and coal, and for other uses and purposes in connection with the operations of its said plant.

That the practical point for the construction of said wharf is at a point on the shore as near as possible to plaintiff's proposed milling plant and, that in order for plaintiff to avail itself of its right of access to deep water, it is necessary to build a wharf extending from the southerly end of what is herein elsewhere referred to as the "Jorgenson Reservation," thence southward along the shore until the present Alaska Juneau wharf is reached; that said wharf, when completed, would include the entire area marked on the plat attached hereto "Proposed Alaska Juneau Wharf," and that all of said area is reasonable and necessary to be used for the construction of such a wharf as an aid to the ingress and egress to and from said upland. [44]

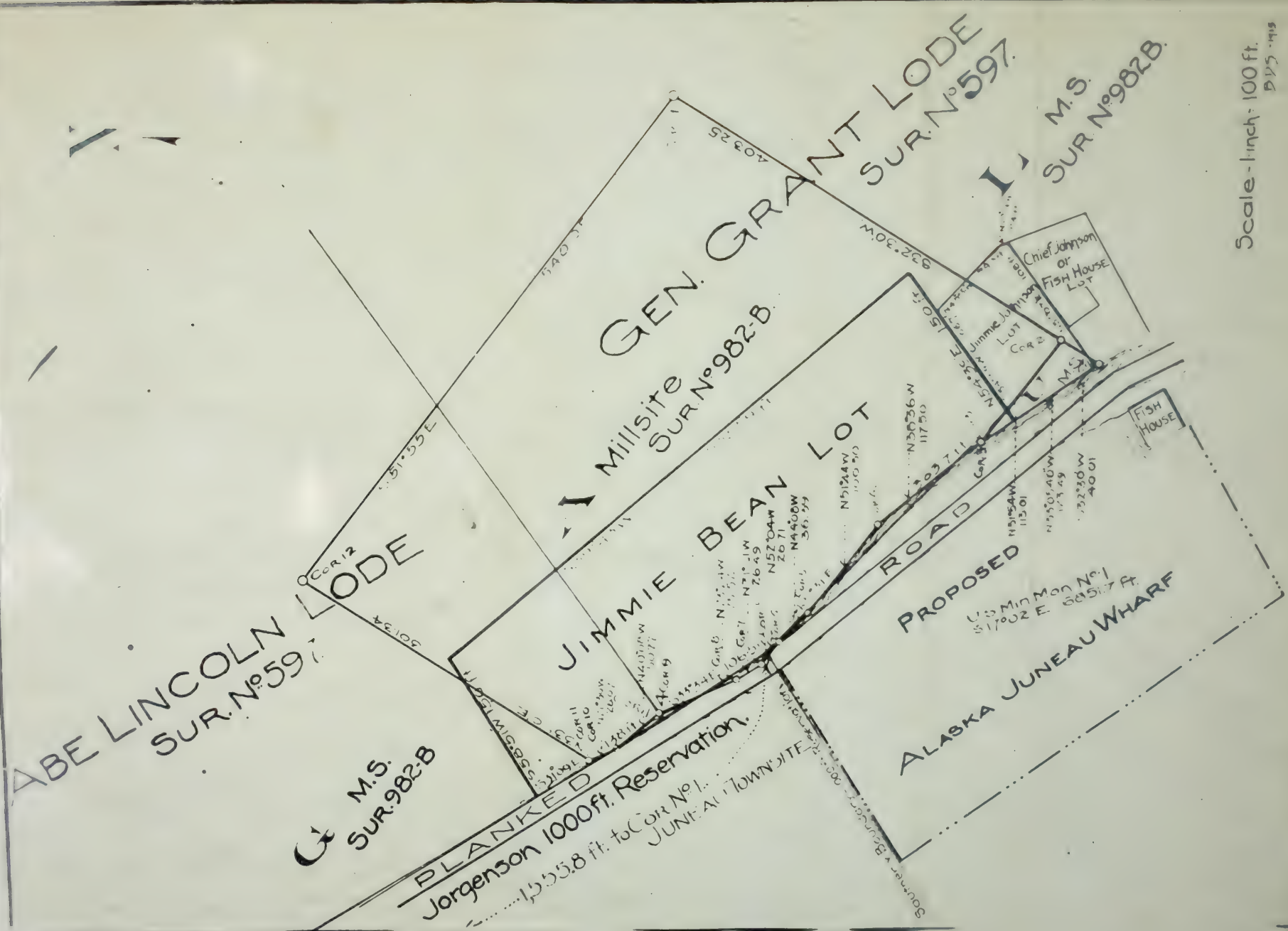
VI.

That the Worthen Lumber Mills is the owner of a sawmill and sawmilling plant, occupying a space of ground one thousand feet in extent along the shore of Gastineau Channel in front of said Abe Lincoln and partially in front of said General Grant lode claims, the said tract being the tract reserved to the J. P. Jorgenson Company in the deed of conveyance made by said company to W. J. Hills, elsewhere referred to in these findings and commencing at a point 555.8 feet south of the southerly corner of the town of Juneau on Gastineau Channel and extending 1000

feet in a southerly direction along said Gastineau Channel.

VII.

That the position on the ground of the tide-flats and waterfront, concerning which the dispute in this case exists, is accurately shown on the following plat, which is incorporated in and made a part of this finding, and lies between what is shown on said plat as the southerly boundary of the thousand foot reservation and what is marked on said plat as "fish-house"; said plat also correctly shows the proposed Alaska Juneau wharf; the southerly boundary of the Jorgenson thousand foot reservation; the position of what is known as the "fish-house"; the General Grant and Abe Lincoln lode claims with reference to the disputed area; the Indian lots purchased by the plaintiff and referred to as the Jimmy Bean lot and also the Jimmy Johnson lot, as well as the position on the ground of the A Millsite and the U Millsite, both owned by the plaintiff; also correctly shows the line of mean high tide between the southerly end of the Jorgenson Reservation and the point opposite the fish-house; the plat also correctly [45] shows the plank roadway extending over the tide-flat between the said southerly end of the Jorgenson Reservation and the fish-house. [46]



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VIII.

That on the 3d day of August, 1913, defendant was erecting a platform for the storage and piling of lumber, upon the said tide-land to the south of said Jorgenson 1000 foot reservation and continued so to do until temporarily enjoined by this Court in this action; that the platform then in the course of erection by the defendant would, if completed, cut off the ingress to and egress from the upland from and to the deep waters of Gastineau Channel, and said platform and the dolphins erected by defendant on the tide-land in question (which were used in connection with defendant's booming ground on the 1000 foot strip aforesaid) and the use as a log booming ground of the space of tide-land in front of said upland to the south of said 1000 foot reservation, do and would interfere with and obstruct such ingress and egress and prevent the building of the wharf aforesaid and thus cut off plaintiff's access to deep water; that the damage resulting therefrom to plaintiff would be such that it cannot be calculated in money, and owing to the continuous character of the trespass it would give rise to a multiplicity of suits; that the plaintiff has no plain, speedy or adequate remedy at law.

IX.

The Court further finds that in the year 1912, and while the plaintiff was the owner of the upland lying between the lower or southerly end of the Jorgenson thousand foot reservation and the Alaska Juneau wharf, the City of Juneau constructed a plank roadway over the tide-lands lying in front of plaintiff's

said upland, having an approximate width of twenty feet; that said roadway was built on piles and not along the line of mean high tide, but wholly over the beach or shore land several feet below the line of ordinary high tide; that the plaintiff did not consent to or give the city any right whatsoever to construct said road but that the same was constructed without consulting the plaintiff; that the [47] construction and maintenance of said street does not, and never did, interfere with any of the plaintiff's rights, and that it is so constructed that the plaintiff can wharf out and have access to deep water, notwithstanding said plank road.

And from said findings of fact the Court draws the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is and was at the time of the commencement of this suit, and of the doing and threatening to do the things mentioned in the complaint, the owner, in possession and entitled to the possession, of the upland lying along the shore of Gastineau Channel between the southerly end of the Jorgenson reservation to the fish-house, situate approximately 400 feet to the south of the southerly end of said Jorgenson reservation.

II.

That the plaintiff, as the owner of the uplands above referred to, is entitled to all the littoral rights attached to uplands abutting on a navigable highway, and more particularly to the right of access over said tide-lands to the navigable waters of Gastineau Chan-

nel, and the right to construct a wharf as an aid to the exercise of the said right of access.

III.

That plaintiff is entitled to a decree of this Court enjoining the defendant from constructing, continuing or maintaining on the tide-land in question any structure of any nature or description which in any way cuts off, obstructs or interferes with the said free and uninterrupted access and the building of said wharf.

Dated this 3d day of July, A. D. 1915.

ROBERT W. JENNINGS,
Judge. [48]

Filed in the District Court, District of Alaska, First Division. Jul. 3, 1915. J. W. Bell, Clerk. By ———, Deputy. No. 1020-A. In the United States District Court for the District of Alaska, Division No. One. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. Worthen Lumber Mills, a Corporation, Defendant. Findings of Fact and Conclusions of Law. [49]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Decree.

This matter coming on to be heard and the plaintiff and defendant being both present and having adduced evidence to prove the issues and the Court being fully advised in the premises and having made its Findings of Fact and Conclusions of Law, which are in writing and on file herein, from which, it appears that the plaintiff is entitled to an injunction against the defendant enjoining it from placing or maintaining structures on the tide-lands situate on the shore of Gastineau Channel at a point hereinafter more particularly described,

NOW, THEREFORE, it is considered adjudged and decreed that the defendant be and it is hereby perpetually enjoined and restrained from constructing or maintaining any piles, platform or structure of whatsoever nature or description on the tide-flats or tide-lands, situate on the shore of Gastineau Channel, between the southerly end of the Jorgenson thousand foot reservation, which is 1555.8 feet to the south of corner No. 1 of the Juneau Townsite, measured along the shore of the channel, and a point on the shore in line with the building known and referred to as the "fish-house," situate approximately 400 feet to the south from the said southerly end of said Jorgenson Reservation, and 1955.8 feet to the south measured along the shore from corner No. 1 of the patented townsite of Juneau. And the said defendant is ordered herewith to remove any and all structures placed by it or maintained by it on said tide-flats so above described, as being situate between

the said southerly end of the Jorgenson Reservation and the said fish-house. [50]

The foregoing decree, however, is subject to the following, to wit:

WHEREAS, defendant has assured this Court that it intends to appeal from said decree, and that it will prosecute its appeal with all practicable diligence, and has applied to this Court for an order staying the operation and effect of the said injunction until said appeal is finally acted upon by the Appellate Court; and,

WHEREAS, it appears that this is a proper cause for the exercise of the discretion of the Court to require bonds;

NOW, THEREFORE, it is further ORDERED that the foregoing injunction shall not be operative until and unless the plaintiff shall give a good and sufficient bond, running to the defendant, its heirs and assigns, in the sum of \$15,000.00, with sureties to be approved by the Judge of this Court, or in his absence by the Clerk of this Court, conditioned that if the final determination of this cause shall be in favor of defendant, the plaintiff will restore the defendant to the status which it now occupies with respect to the tide-land involved herein, and to all the benefits, advantages and privileges now accruing to said defendant, and of which said defendant would have been deprived by reason of said injunction. Defendant is allowed sixty days within which to present Bill of Exceptions.

Done in open court this 27th day of July, A. D. 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Jul. 27, 1915. J. W. Bell, Clerk.
By ———, Deputy. [51]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

vs.

WORTHEN LUMBER MILLS, a Corporation,

Memorandum Opinion. [52]

JENNINGS, Judge:

It would serve no good purpose to review the many authorities cited by the parties to this suit as to rights of an upland owner in Alaska, for those rights have so often received consideration from the Circuit Court of Appeals of the Ninth Circuit that it is too late to question in this court at least, the doctrines announced by the Appellate Court.

Plaintiff contends that the upland owner is entitled to "wharf-out," while defendant controverts this contention. By the plaintiff the Court is referred to the case of Dalton vs. Hazelett, 182 Fed. 562, where our Circuit Court of Appeals sustained the right of Hazlett to wharf out; and by defendant

the Court is referred to the language of Judge Gilbert in *McCloskey vs. Pacific Coast Company*, 160 Fed., 179, as follows: "While it had not the right to wharf-out on the tide-lands in front of its property," and to other cases in which the "right to wharf-out" is in general language denied.

There is no conflict between the principles enunciated in these two cases from our Appellate Court. It is laid down in the case of *Hampton vs. Columbia Canning Company*, 161 Fed. 64, and the case of *Barron vs. Alexander*, 206 Fed. 272, and in several other cases from the Court of Appeals, that the upland owner has the "right of access to navigable water." Access for the upland owner to and from the navigable water does not mean necessarily access for him merely as a pedestrian, or as an equestrian, or as a teamster. It means access to or from the water in the usual way by which such access is attained and enjoyed; and that is dependent upon the purpose for which such access is desired, and upon the reasonableness of the manner in which it is proposed to make such right available. The right of access to and from the deep water is analogous to the right of access enjoyed by an abutter upon any other highway. The latter has the right to use his land for the purposes for which he desires and for [53] which it is susceptible. The only instrumentality that can approach the upland from the navigable water is one that is capable of navigating the navigable water, to wit, ships boats and other water craft; those are the things which navigate the highway, and those are the things which bring to the upland that which the

owner desires to use upon it, and it is by means of these that the owner leaves his land to navigate the highway. Ships are ineffective unless they proceed from one place to another and they cannot usually land without wharves and docks to tie to, and usually they cannot discharge their freight except by means of wharves. If it be necessary for such "navigators of the highway" to have a wharf to which to make fast in order that this right of access may be enjoyed by the upland owner, then the latter has a right to construct on the shore such a wharf as may be appropriate. He may do this, not because he has a right to erect the structure on the shore, but because he has a right of access to the deep water and he cannot enjoy that right except by means of a wharf. The right to build a wharf in such cases is not a major right, not an independent right, not an all sufficient right—it is a qualified right, having no potency whatsoever except in so far as it is referable and appertinent to, and is a part of that other right, called the right of access. The owner of a right of access certainly has the right to make his right of access practical.

"It is a general rule that when the use of a thing is granted, everything is granted by which the grantee may enjoin such use. By analogy, we may reason that the riparian owner's right of access to the navigable waters in front of his upland comprehends, necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right."

(80 N. E., 670.)

And so in the case of Dalton vs. Hazelett, *supra*, our Circuit Court held that Hazelett, although not having and not claiming to have any right or title to the soil below high-water mark, yet had the right to build a wharf from his upland to the deep [54] water in order to facilitate his access to and from that deep water, using the following language:

“(182 Fed. 573.) We think that under the facts stated, the plaintiff is entitled to be relieved against this obstruction; that while in a territory a grant of land bordering on or bounded by navigable waters conveys to the grantee no right or title to the shore or soil below high water mark, nevertheless such a grantee has the right to a free and unobstructed access to such waters. (1 Farnham on Waters, 297.) But how shall the littoral owner have access to navigable waters where shoal water intervenes? The Supreme Court has answered this question in Dutton vs. Strong, 66 U. S. 23-32, where the Court said: ‘Wherever the water of the shore so to speak is too shoal to be navigable, there is the same necessity for such obstructions as in the bays and arms of the sea; and where that necessity exists it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases.’ ”

In 17 N. W., 629, it is said:

“This expression ‘to the point of navigability’ must be understood ‘as giving the right to the

extent necessary to make the abutting property reasonably available at any ordinary stage of water for any kind of navigation for which the stream is used, and for which it is adapted. It must have reference not only to an ordinarily low stage of water but also the size and kind of vessels which navigate the stream, and the kind of business done upon it.”

There is nothing in *Columbia Canning Company vs. Hampton*, nor in *Barron vs. Alexander*, nor in any other decision of the Circuit Court of Appeals to which this Court’s attention has been directed which is not in strict conformity with the doctrine announced.

In the *Columbia Canning Company* case it was neither alleged nor proven that the plaintiff’s right of access was cut off. In that case the plaintiff founded his action on an alleged right in himself to keep anybody else from erecting a structure on the tide-land in front of his upland because it would interfere with a fish-trap which he wanted to build on the tide-land (the right to erect such fish-trap not being at all referable to any right of navigation or any right of access). The complaint did not allege that the upland owner’s access was being interfered with, and the Circuit Court simply held that the complaint did not state a cause of action; In the *Barron* case the lower court *found as a matter of fact* that the erection being made by Alexander [55] did not interfere with any right of access inhering in *Barron*, and the Circuit Court of Appeals simply sustained the holding. In neither case was it held

that the upland owner had not the right to wharf-out in aid of his right of access.

THE RIGHT OF ACCESS IS AN EASEMENT ONLY.

It is said in *Yates vs. Milwaukee*, 77 U. S. 594, this right is "a right by which, when once it is vested, the owner can only be deprived in accordance with the established law, and if necessary that it be taken for the public good, upon due compensation."

Having, then, that right of which he cannot be deprived by the Government except on due compensation, certainly an intruder cannot deprive him of it, nor can any other person who has no greater right than he has. The upland owner having no property right in the soil of the foreshore but only a right of access to and from navigable water, the right is only as easement.

It is only for the purpose *of use* in getting to the highway that the right of access is given; if the upland owner has *no use* for the access, the mere *right of access* is ineffective. This is indicated by the following language in *Gould on Waters*, 2d Edition, Sec. 149, page 304:

"But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water, *for the purpose of using the right of navigation*. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists, in the case of tide waters, even when the

shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance, or authorized by the legislature." (Italics ours.)

USE MUST BE REASONABLE.

This easement—this right of access, like all other easements, is subject to the general rules that the use must be reasonable. (*Hedges vs. West Shore Railroad*, 44 N. E. 691), and "What shall be deemed a reasonable and proper use of a way depends [56] largely on the local situation and on the public usage." (14 Cyc., 1207.)

If the easement is not susceptible to the use for which it was dedicated, there can be no injury for which an injunction will lie.

2 Beach Equity Jurisprudence, Sec. 713, citing
Rouge vs. Appallaacha Cola, 25 Fla. 672;
Prince vs. McCoy, 40 Ia. 533;
Bigelow vs. Hartford, 14 Conn. 565.

If the owner of the dominant estate has other and equally convenient means of access to it and will not suffer any material damage by the alleged obstruction, equity will not interfere.

2 Beach Injunction, sec. 1017.

As said in *Olinda vs. Lathrop*, 21 Pickering, 297 (38 Mass.)

"What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and acquiescence

of the public is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use, it may be laid down that in a populous town where land is very valuable it is not unreasonable to erect buildings and fences on the line of the street and to place doors and gates in them so as when opened to swing over the street."

"Where a way is granted or reserved without any limitation as to its use it will not necessarily be confined to the purposes for which the land was used at the time the way was created but may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted."

14 Cyc. 1207, and cases cited in Note 95.

In *Barnes vs. Midland Railway Company*, 85 N. E. 1096, the Court said:

"It is enough to say that either as littoral owner or by virtue of its letters patent, the defendant had the right to construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended, and that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the foreshore, the former was paramount and the latter was subordinate; and the logical corollary to that proposition is that, just in so far as

the attempted exercise of the littoral or riparian right passed the prescribed bounds of necessity and reason, the conditions were reversed and the right of passage along the foreshore remained the paramount right. That is so because the littoral or riparian owner, in his capacity as such, acquires only those rights in the foreshore [57] “which are necessary to enable him to make a reasonable use of his upland; and the principal attribute of such use is access to and egress from the open water. The defendant therefore had the right to erect and maintain a pier for the purpose of connecting its upland with the sea. Just so far as it was a necessary consequence of the reasonable exercise of that right to obstruct the foreshore and thus to limit the free and convenient passage of the public, the defendant’s rights are superior to the extent that the defendant transcends these bounds, the rights of the public remain unaffected.”

It is urged that to accord to the upland owner this right of access would lead to monstrous results. The inquiry is made: If a person owns a mile or more of water front and is not using and is not needing the foreshore for the purpose of having access to or from the navigable water, is he entitled to sit still and say to every one else, “Although I am not using this foreshore for any useful purpose, yet you shall not erect any structure thereon because that will preclude me from using the right of access ten years from now.” The Court has been cited to one case which seems to subscribe to such a doctrine, to wit: *Reeves vs. Brooks*

Co., 86 N. W. 337. That is a Minnesota case and in that State the fee in the land to the center of the stream is in the riparian owner. The answer to the question is found in a consideration of the fact that the right of access is an easement only, and that the easement must be *exercised reasonably*.

In the case of Coburn vs. Ames, 52 Cal., at page 398, it was said:

“Assuming as we do for the purpose of this decision that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high-water mark on the theory that at some future time he may possibly change his mind and desire to erect a wharf. * * * and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. * * * In this State there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless, in virtue

merely of his riparian rights, might maintain ejectments for all such structures erected by others, which, when recovered, he [58] might either demolish or cease to use in aid of commerce, it is not difficult to see the disastrous consequences which would result from such a doctrine."

In the case of *Barron vs. Alexander*, 4 Alaska, 591, a former judge of this court, citing and quoting from many of the cases here quoted from, announced that the right of access did not necessarily mean access in a line drawn "at right angles to the shore line"—reasonable access, according to circumstances, was all the upland owner was entitled to. Judge Lyons there quotes approvingly from the decision in *Taylor vs. Commonwealth*, 47 S. E. 871, as follows:

In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected, and as far as the record discloses there is no purpose to erect, any pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised, or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. Is it reasonable that the commonwealth, holding title to the soil, is to be wholly subordinated in the use of it to the use

with which another is clothed merely by virtue of being an owner of the adjoining shore, when the rights of each and all can be fully protected without diminution and without hindrance? If the time should come when the river front of the plaintiff shall be divided into lots, whose owners find it necessary to their profitable enjoyment to erect piers and wharves upon them if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and, in the light of changed conditions, the court may be again called upon to consider the respective rights of the riparian owner and those remaining in the commonwealth, or which have been granted by her to others.”

From the foregoing it would appear that the claimant of littoral rights must show—

- (1) That he is a littoral proprietor;
- (2) That he desires to use the tide-lands to get to deep water;
- (3) That the use contemplated to be made and the method of availing himself of the use, is reasonable;
- (4) That the access is being interfered with.

[59]

IS PLAINTIFF A LITTORAL PROPRIETOR?

Plaintiffs acquired the General Grant lode claim from the grantors of defendant and before the defendant acquired any rights. The mining claim was bounded by the beach—the conveyance was on record

at the time defendant purchased. Defendant must be held to have known that the mining claim was bounded by the beach. His grantor Jorgenson reserved only 1000 feet along the shore; presumably that is all he needed.

Not only that, plaintiff is a littoral proprietor by virtue of the Indian occupation, to which it succeeded. Indeed, it does not seem to be seriously contended that plaintiff does not own the upland, but is contended that his littoral rights are cut off by the

STREET

Defendant contends that the plaintiff has no littoral rights, because, as he asserts, the city of Juneau has opened up a street in front of plaintiff's upland and thereby a public right intervened (and does now intervene) between the upland and the deep water, and insomuch as plaintiff did not object to the opening up of the street his mouth is now closed.

This contention that there is such a street rests upon the following evidence:

In 1912 the City of Juneau planked over a strip —feet in width running in front of plaintiff's upland. This suit was brought August 6, 1913. From 1912 to the last mentioned date the public have constantly used said street to such an extent that it has become one of the principal streets of the town. Plaintiff has never taken any steps to prevent the public from so using the "street."

However, the evidence also shows that that portion of this so called street which is in front of the premises in dispute is [60] *between high and low-water mark*, that is, on the tide-lands. Now, the

public had a right to pass to and fro over that strip of shore, whether there was or was not a street there, provided there was no interference with plaintiff's access to deep water. The planking over of that space and calling it a street did not in any way increase the public right of passage nor decrease or interfere with plaintiff's right of access. Plaintiff therefore was and is in no position to protest. It does not appear that he has at any time had any standing in equity to protest. An application by him for an injunction against the so called street would at once have met with the answer that his right of access has not been impaired: Having then no standing to make complaint, he cannot be prejudiced by the fact that he made no complaint.

Plaintiff has never conveyed any of his upland to the city, nor dedicated it to the public use, nor in any way signified his assent to the cutting off of any of the upland rights, or shown even to have knowledge that such a claim was in contemplation. No upland rights have been condemned. To say that the mere pronouncement by the city that "this piece of shore land, which, like all other shore land, *has been* a passage way without cutting off littoral rights, shall *from now on* be a passage way which *shall* cut off littoral rights," would be to make an untenable statement. Certainly such a mere pronouncement could not have that effect in one short year.

The Miocene Ditch case, 146 Fed., 680, and the other cases cited by defendant on this point depend on the law of estoppel. In each case cited the complainant had it in his power to prevent the taking of

his land without compensation. He chose to take no such steps. He stood idly by while large sums were expended and the courts held that he was relegated to his action for damages. But here the upland owner had no cause for complaint because his rights were not interfered with. [61]

The Court therefore experiences no difficulty in finding that the plaintiff is the owner of the upland, and has the usual littoral rights.

We pass, then, to a consideration of

THE ACCESS DESIRED.

What is the nature and extent of the access desired? Is that nature and extent reasonable? How does plaintiff propose to avail himself of that right of access? Is that way reasonable? These are all pertinent questions.

Plaintiff has shown that it is the owner of a large number of quartz claims in the mountains back of Juneau and that it desires to develop them by transporting the ore taken and to be taken therefrom, to the mills which are to be situated upon the millsites which it has acquired on the upland back of the tideland in controversy. The testimony of Mr. Bradley, the manager of the plaintiff company (as supplemented by Plaintiff's Exhibit "Y") is to the effect that on the upland just back of the proposed wharf is to be situated a Turbo Electric Power-house and an oil tank of capacity 30,000 gallons, and that higher up on the upland are to be situated mills with an ultimate capacity of 8,000 tons per day. A pilot mill of 50 stamps has been erected and is in operation and more than a million dollars has been expended in

getting ready for the more extensive operations. The tunnel through the mountain for the transportation of ore from the mine to the mill has been completed, and the hauling of ore through it is in active operation. The company has raised \$4,000,000 more for the prosecution of the works.

The space on Defendant's Exhibit "Y," marked in red "Proposed Wharf," is the site of the obstructions complained of. This space lies wholly on tideland and in front of the upland of which plaintiff is the owner. Mr. Bradley further testified that on that space plaintiff intended to build a wharf immediately for the receiving of coal and that on this wharf would be built [62] coal-bunkers for the landing and storage of coal to be used in connection with the works. He testified that plaintiff contemplates the immediate erection of the said 8000 ton milling plant, and that such an undertaking will require a tremendous amount of materials—iron work, steel work, heavy machinery, etc., and that this must all be landed and assembled so that it can be handled in the proper way and in the proper sequence, and that the yarding of such a vast amount of materials and machinery requires considerable area, so located that the materials may be most conveniently handled. When asked if there was any other space available for that purpose, he answered: "There is a small amount of space between the two points marked warehouse, but we haven't considered that because that alone is not sufficient."

The Court can see how this might be the case. If in the construction of these mills everything could

move like clockwork; if all material could be delivered on the wharf bit by bit exactly when needed; if when landed, it could be immediately removed from the landing place and installed,—it is likely that a wharf smaller than that desired might answer all purposes. But the very nature and magnitude of the enterprise precludes this possibility. Not mining machinery of every kind is kept in stock—much of it has to be made to order, of particular dimensions and after special patterns; it requires time in the making—it is not all made by the same concerns; it will not all be delivered at the same time nor in the same vessels. It is not at all unthinkable that that which is needed at a later date may be delivered at an earlier date. In such cases a vast amount of shifting must be done. That which is delivered before needed must be moved to give place to later shipments. It is reasonable to suppose that large vessels, each freighted with particular kinds of material, may have to be accommodated at the wharf at one and the same time. Lines will have to be run at angles and for considerable distances to hold these vessels. The Court has no reason [63] to question the good faith of the enterprise nor to doubt Mr. Bradley's statement that all this space will be needed, and that the company purposes to proceed immediately. The witness furnished no figures or estimates and contented himself with the general statement, but this was sufficient on direct examination and he was not cross-examined on that point. The Court concludes that the figures and estimates could have been given and would have borne him out. It all seems reason-

able and there is no evidence to the contrary.

It may be true that the plaintiff has other water frontage further down the channel where it *might make* a wharf. The Court expresses no opinion on that point, for the question is not whether or not some other place might be put up with, but whether or not the place which is desired is reasonable and proper. It surely is not unreasonable to desire that the landing place of the materials shall be as near to the place of proposed use as it is practicable to have it.

It is found, therefore, that the proposed use of the right of access is necessary and reasonable.

The plaintiff's right of access not being limited to the right of mere physical passage over the tideland, but embracing also the right to use the foreshore in such way "as may be needed for the complete and innocent enjoyment of that right," it follows that he is entitled to an injunction against any interference with that right.

It may be a hardship on defendant thus to be confined to the 1000 foot reservation made in the deed to plaintiff's grantors, but I cannot see how that is to be avoided. One man's necessities cannot be made the measure of another man's rights. When Jorgenson reserved the 1000 foot strip, presumably that is all he wanted. The Sovereignty grants the upland and thereby burdens the tide-land with the easement, and anyone occupying the tide-land does so subject to the easement. That is defendant's situation [64] as to any occupancy outside of the 1000 foot reservation.

The findings and decree will be for the plaintiff. I am not so sure, however, about the form of the injunctive part of the decree. Until these obstructions actually interfere with the work of building, plaintiff has no right to injunction. Let the decree be so framed that, in case there is built a wharf smaller than the one contemplated, or in case no wharf at all be constructed, defendant will not have been needlessly deprived of the advantage which his occupancy and use of the tide-land has obtained for it. There must be precedents for such form of injunction. Counsel might examine

Crocker vs. Manhattan, 66 N. Y. S., modified
in 70 N. Y. S. 492.

McCann vs. Chasm Power Co., 136 N. Y. S.
383.

Loukes vs. Payne, 125 N. Y. S. 850.

[Endorsed]: No. 1020-A. In the United States District Court for the District of Alaska, Division No. One. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. Worthen Lumber Mills, a Corporation, Defendant. Memorandum Decision. Filed in the District Court, District of Alaska, First Division. Apr. 30, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [65]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Bill of Exceptions. [66]

Index of Exhibits

(hereto attached).

WORTHEN LUMBER COMPANY'S EXHIBITS:

Exhibit #3—Deed dated Mch. 24, 1913, between
Alaska Supply Co. and Worthen
Lumber Mills.

Exhibit #4—Photograph showing sawmill, etc., of
Worthen Lumber Mills, taken at
3:25 P. M. July 30, 1913.

Exhibit #5—Photograph taken approximately
200 ft. below boiler-room of mill,
looking down channel and across
toward Treadwell.

Exhibit #6—Photograph taken from main Alaska
Juneau dock looking up past the
float through the log boom.

Exhibit #7—Plat of Mineral Survey No. 982, A
and B.

Exhibit #8—Map Worthen Lumber Mill property, showing Abe Lincoln and General Grant lodes.

Exhibit #9—Ordinance No. 87 of the Town of Juneau, providing for extension, etc., of Franklin St.

Exhibit #10—Plan of Franklin St., 1907.

Exhibit #11—Photograph representing portion of mill below the Jorgenson Reservation line seaward.

Exhibit #12—Photograph taken from float at lower end boom looking toward mill—showing boom grounds, etc.

Exhibit #13—Photograph looking up towards Alaska Juneau tramway and mill.

Exhibit #14—Photograph taken from street at extreme end city limits, looking up the hill at Alaska Juneau tramway.

Exhibit #15—Photograph taken from street at extreme end city limits, showing down the channel southeast from Alaska Juneau wharf.

ALASKA JUNEAU COMPANY'S EXHIBITS:

Exhibit T—Location notice of "A" millsite.

Exhibit V—Deed from J. Z. Bayless to Alaska Juneau Company, transferring "A" millsite, dated July 22, 1911.

Exhibit X—Deed from Jimmie Bean, et al., to Alaska Juneau Company, dated August 22, 1914. [67]

ALASKA JUNEAU COMPANY'S EXHIBITS
(Cont.):

Exhibit Y—Map showing Jorgenson 1000 ft.
reservation.

Exhibit Z—Deed from Fanny Johnson, et al., to
Alaska Juneau Company, dated
May 1, 1913.

Exhibit A-1—Deed from John Jackson to Alaska
Juneau Company, dated July 25,
1912.

Exhibit H-1—Location notice of General Grant
lode.

Exhibit K-1—Notice of amended location of "U"
millsite.

Exhibit N-1—Deed from R. G. Wayland to Alaska
Juneau Company, transferring
"U" millsite, dated Feb. 15, 1913.
[68]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

BILL OF EXCEPTIONS.

This cause came duly on to be heard before the
Honorable Robert W. Jennings, Judge of the above-
entitled court, at the courthouse in Juneau, Alaska,

on the 15th day of April, A. D. 1915, without a jury; Hellenthal and Hellenthal, Esqs., appearing for plaintiff, and John Rustgard, Esq., appearing for defendant; that thereupon the following evidence was adduced and proceedings had, to wit:

(This case was tried together with other cases, which accounts for the fact that some of defendant's evidence appears in the records before any evidence on behalf of plaintiff appears.)

[Testimony of Victor Wilhelm, for Defendant.]

VICTOR WILHELM, a witness called on behalf of the Worthen Lumber Mills, being first duly sworn, testified as follows:

Direct Examination by Mr. RUSTGARD. Q. State your name, Mr. Wilhelm. A. Victor Wilhelm. Q. What is your occupation? A. Surveyor. Q. How long have you followed that occupation, approximately? A. About four or five years. Q. You are a United States Mineral Surveyor as well as a land surveyor? A. Yes. Q. Are you familiar with the waterfront of Juneau from the sawmill, including the sawmill, along the channel down towards the Alaska Juneau wharf? A. I am. Q. Have you made a survey of that track of ground? A. I have. Q. I will ask you to look at this blue-print (handing blue-print to witness); have you seen this blue-print before? A. I have. [69—1] Q. Who made it? A. It was made from surveys made by me—by Mr. Wettrick and myself. Q. Mr. Wettrick, your partner as a surveyor? A. Yes, sir. Q. Made the survey and this is a blue-print of the tracing you drew from the survey? A. Yes. Q. Is this a correct sur-

(Testimony of Victor Wilhelm.)

vey and a correct map of the survey? A. It is.
Q. Now, what scale is this drawn to? A. Fifty feet to the inch. Q. I call your attention to the claims marked Abe Lincoln Lode and General Grant Lode; in making the survey did you find the corners of those mining claims? A. No; the only corner found was, I think, corner No. 2 of the General Grant.
Q. Where is corner No. 2 of the General Grant? A. Why, up there where it ties, a known point by which we established the corners. Q. Where did you get the description of the claim? A. From the Surveyor General's Office. Q. I call your attention to a fine hair-like line cutting the place marked "Dry-shed," a little southerly from the center of the dry-shed and continuing a little below Franklin Street until opposite the General Grant it crosses over to the northeasterly side of Franklin Street—what does that line represent? A. That represents the meander line or line of mean high tide which was established by J. Frank Warner, Townsite Surveyor, in the townsite survey, which overlaps a part of these claims. Q. This meander line marks the line of mean high tide? A. As established by Mr. Warner. Q. Who was Mr. Warner? A. He was the United States surveyor. Q. Have you checked up that line yourself to determine whether it was correctly established? A. Yes, sir, I have. Q. Was it correct? A. It was a year ago; it was correct as to mean high tide, although conditions are changing along the waterfront; to-day I think the mean high-tide line is a little further out. Q. A little lower

(Testimony of Victor Wilhelm.)

down? A. Yes. Q. Now, Warner, is in the employ of the Department of the Interior? [70—2]

A. Yes. Q. He surveyed the land above mean high tide for the purpose of a townsite patent? A. He

did. Mr. HELLENTHAL.—I think, your Honor, that is irrelevant testimony. The COURT.—I don't

know—I cannot tell yet. Q. Have you marked on this map the course of Franklin Street from the northeast corner of the dry-shed of the mill in a

southeasterly direction? Since you made that blue-print, you have marked that on the tracing from which the blue-print was taken? A. Yes. Q. I call

your attention to the place opposite or out from the shore where there is a bight in the beach the lower side of Franklin Street southeasterly from that row of pilings marked on the lower side of that street—what building or structure, if any, does that represent?

A. That is a structure known as the fish-house. Q. Do you know of the gridiron on the northwesterly side of the fish-house? A. Yes, a platform.

Q. That is for the purpose of placing boats on, that is what is meant by gridiron, isn't it, for boats—three or four timbers laid horizontally, supported by piles? A. Yes; that is true. Q. Now, then, is

that gridiron included within the exterior lines?

A. Yes, it is. Q. The shaded diagonal lines represent the building itself? A. Yes, sir. Q. And the

gridiron is within the exterior lines and next to the shaded portion? A. Yes, sir. Q. I asked you about

the area marked "Planked"—how wide is that area from the southwesterly side of Franklin Street? A.

(Testimony of Victor Wilhelm.)

Sixteen feet, planked. Q. Will you state to the Court the distance from the southeasterly end of that planked platform to the gridiron next to the fish-house? A. (After measuring.) It is about 270 feet. Q. These round circles on that space of ground adjoining the southwesterly side of Franklin Street—what do they represent? A. They represent pits where we sunk through mud and debris which had been recently deposited to the gravel beach; it is a fine mud, silt, which was deposited by sluicing. [71—3] Q. Well, is there anything here representing the piles? A. These are the dolphins or pilings out at the outer edge. Q. What is that (indicating) and this? A. Those are piling. Q. Now, then, what are the pilings there (indicating)? A. They are long piling driven in the beach line about 16 feet high. Q. Now, then, when you referred to the pits you referred to these little dots with the figures close to them? A. Yes, sir. Q. In that line, about 16 feet southwesterly from the street, there are four? A. Yes, sir. Q. The rest of them are piles? A. Yes, sir. Q. Do you remember what time these piles were put there—can you tell approximately? A. When they were first placed there? No, I couldn't say; they have been there for a year and a half, at least. Q. Well, what time did you sink those pits? A. Those pits were sunk in February a year ago, if I remember right. Q. That was long after the case was started? A. Yes, sir. Q. That was about a year ago—you did that at the request of Mr. Worthen? A. Yes, sir. Q. What is

(Testimony of Victor Wilhelm.)

the width of Franklin Street from the northeast corner of the dry-shed of the mill? A. To the south of that point the street is 20 feet wide as built today, although the city reserves, I think, a 30-foot width. Mr. HELLENTHAL.—We object to the testimony of what the city reserves. Mr. RUSTGARD.—That part of it may be stricken. Q. What time was that street built? A. The construction of the street was started in the spring of 1912. Q. Do you remember what time it was completed? A. It was completed that fall; it was built to connect with the Government road. Q. Now, where does the Government road start in? A. The Government road starts in at what is called the incorporated limits. Q. Now, this point marked with a cross is the limit of the incorporated town? A. Yes, sir. Q. And the city built the street down to that point and the Government continued it down to Sheep Creek? A. Yes, sir. [72—4] Q. From thence on this street where it runs through the city is built of planks upon posts placed upon the ground? A. Yes, upon piles. Q. Above or northerly from the dry-sheds, what is the width of the street? A. The width of the street as laid out is 40 feet, although it is not 40 feet wide at every point. Q. It isn't planked that wide? A. No, sir. Mr. RUSTGARD.—I offer this map in evidence. Mr. HELLENTHAL.—Oh, I guess there is no objection to it. The COURT.—Do you offer that as showing the condition of things as they now are? Mr. RUSTGARD.—Yes, your Honor. The COURT.—Very

(Testimony of Victor Wilhelm.)

well. (Whereupon said map was received in evidence and marked Worthen Company's Exhibit No. 1, and is a copy of exhibit 8, hereto attached.) Q. I call your attention to the space southerly from the fish-house marked "Float"—what is that? A. That is a float that has been constructed by the Alaska Juneau Company for the landing of small boats. Q. How is that constructed? A. It is a slip. Q. They drove a row of piles and have the float in between the piles? A. Yes, sir. Q. The piles are driven for the purpose of holding the float in position? A. Yes, sir. Q. The float rises and falls with the tide. These dots or circles in the channel southwesterly from Franklin Street and in an easterly direction along the shore from the sawmill—what do they represent? A. They represent dolphins that have been driven—there are some two, and some, I think, are three piling.

[Testimony of Edward Webster, for Defendant.]

EDWARD WEBSTER, a witness called on behalf of the Worthen Lumber Mills, being first duly sworn testified as follows:

Direct Examination by Mr. RUSTGARD.

Q. State your name. A. Edward Webster. Q. How long have you lived in Juneau, Mr. Webster? A. Since 1881. Q. Are you familiar with the part of Juneau where the sawmill and booming ground of the Worthen Lumber Mills is situated? A. Some; yes. Q. What has been your business during these years you have been in Juneau, principally? A. My

(Testimony of Edward Webster.)

business there was pile-driving. Q. Have you ever driven any piles on the ground now occupied by the sawmill I referred to? [73—5] A. I think I have driven them all. Q. When did you first start in driving piles there? A. In 1902. Q. Do you remember what time of the year? A. Why, in the spring of the year; I think it was in May some time. Q. What were those piles driven for? A. Well, they were driven for Mr. Jorgenson for the sawmill. Q. Now, that was Mr. J. P. Jorgenson? A. J. P. Jorgenson. Q. Is that the same person who operated the so-called J. P. Jorgenson Company? A. Yes, sir. Q. Do you remember now what time he started the sawmill? A. In the spring of 1902. Q. What time did he get it completed sufficiently to saw logs and lumber? A. I don't know whether it was that year or the next year—I am not sure of that. Q. Not sure of that? A. No. Q. Do you remember if the J. P. Jorgenson Company at any time did make any use of the shore land southeasterly from the sawmill? A. Make use of the shore land? Q. Yes, or the tide-lands. A. I know he had booming grounds there that he boomed his logs in. Q. Did he have any dolphins driven anywhere? A. Yes, I drove a line of what we call booming piles to hold his logs in. Q. Can you point out on this map, marked Worthen Company's Exhibit No. 1, that line of dolphins, approximately? A. I would say this like the line along through there (indicating on Worthen Company's Exhibit No. 1). Q. Did you ever drive any piles closer to the beach? A. Yes.

(Testimony of Edward Webster.)

Q. When and where? A. In August, 1912, we continued this row that is marked "Dolphins," we drove 10, continued it still further down; and on the shore we went along there and drove 17 piles in the shore line. Q. In August, 1912, you drove 17 piles on the shore line northwesterly from the fish-house?

A. Yes, sir. Q. Approximately parallel to the beach? A. Yes. Q. At the time you drove those,

had Franklin Street been planked at that time? A.

No, sir. Q. How close to where Franklin Street was afterwards planked did you drive those piles? A. Now, I am not quite positive of that; some of those were cut off and Franklin Street was built on them.

[74—6] Q. They form the edge of the street, anyway? A. Yes; I think there are some of them on the outside of it; I am not positive, but I know some of them were cut out of the road to build this street on, and I wouldn't say there wasn't some that the street is built on where they come handy. Q. At

whose expense and request did you do that? A.

This last? Q. Yes. A. Mr. Henry Shattuck. Q. He

was then operating what is known as the Alaska Supply Company? A. That is the way we charged

the bill, the Alaska Supply Company. Q. The piles that you drove for the mill, you drove at the request of the J. P. Jorgenson Company? A. J. P. Jorgenson

Company, yes, sir. Q. And the string of dolphins you first drove was at the request of the same company, and those you drove in 1912 were driven at the request and expense of the Alaska Supply Company? A. Yes. Q. You know who occupied

(Testimony of Edward Webster.)

what was, or has been referred to as, the fish-house at the time you drove those 17 piles near Franklin Street? A. Yes; I drove the fish-house piles; there was three parties interested in it that paid me; I drove those, I think, in 1911. Q. Nels Pearson was one? A. Yes. Q. And Knudt Topness? A. Yes, that is the other one. Q. And Peder O. Holsboe? A. Yes; those are the three. Q. Do you remember what year you drove those piles for them? A. If I remember right, it was 1911; whether that is correct or not, I don't know; I went down and drove 75 piles for them early in the spring, whether that was 1911 or '12 I wouldn't say.

Cross-examination by Mr. JACK HELLENTHAL.

Q. I want to ask Mr. Webster a question or two. Mr. Webster, you drove all the piles that are in this log boom? A. Yes, sir. Q. You first drove piles for Mr. Jorgenson and afterwards for Mr. Shattuck? A. Yes, sir. Q. And there were no piles driven there except the ones that you put there? A. Of course, on the inside there was; Mr. Alex Hart drove [75—7] some inside of that, along side of the street after the street was in. Q. I mean until the time you put the piles in there in 1912 there had been no piles driven there except the ones you placed there? A. No, sir. Q. Now, the first piles you drove for Mr. Jorgenson were entirely out along the outer line indicated on this map that has been offered in evidence? (Referring to exhibit No. 1.) A. Yes. Q. Commencing with the sawmill and extending southward? A. No;

(Testimony of Edward Webster.)

they extend east. Q. Down the channel, anyway?

A. Yes. Q. Then while Mr. Jorgenson was the owner of the mill you drove some more piles in that some line, didn't you? A. Yes, we drove for Mr. Jorgenson—that is, first we started with a double pile and then alternated with a double pile, and then went back and put in double piles all along.

Q. So constructed the entire boom that you had a double line of piles the entire distance? A. Yes.

Q. The second time you didn't extend that boom any, you simply repaired it—went in and repaired it? A. No; we extended it down 50 feet, about.

Q. I am talking about the second time you drove for Mr. Jorgenson? A. No; we didn't extend it; we only filled in every alternate pile with a new pile again. Q. Now, the first time that you drove

piles for Mr. Jorgenson you drove them along the outer line indicated on this map? A. Yes. Q. And

you didn't double-pile except each alternate pile? A.

Each alternate pile; they are 50 feet apart; then I don't say just when it was, we went back afterwards and

drove those alternate piles. Q. You double-piled the entire distance? A. Yes. Q. You didn't extend

the boom any further south, or down shore? A. No,

sir. Q. And in 1912 you drove some piles for Mr. Shattuck? A. Yes. Q. At that time you ex-

tended the boom further down in the channel? A.

Yes. Q. When you came there in 1912 there had been no piles driven along the inside row indicated on this

map? A. There had been no piles driven on the shore

anywhere. Q. You drove 17 piles extending down

(Testimony of Edward Webster.)

from the fish-house? A. Yes. Q. That was in August, 1912? A. Yes, sir. Q. That was the first time there had been any piles anywhere along there? A. Yes, sir. Q. And in that [76—8] same month, August, 1912, you extended the boom you had previously constructed for Mr. Jorgenson by driving other piles along the outward side of the boom? A. Yes, sir. Q. In the direction of down channel? A. Yes. Q. You put some 10 piles in there? A. Yes, sir. The COURT.—Now, let me ask a question right there: That was in 1912? A. Yes, sir. The COURT.—At the time of that transaction did you drive the dolphins as far down as they are represented on exhibit No. 1? A. I don't remember how it was in there, but I think the present ones that are in there now—I wouldn't say for sure whether any had gone out—you mean I drove those present ones there now, or extended that line down? The COURT.—You take exhibit No. 1—you see where the last dolphin to the south-east is down the channel—is that the extent that you drove the piling in 1912 for the Alaska Supply Company? A. Yes, sir. Q. There haven't been any piles driven there since you put them in in 1912? A. No; I don't think so. Q. It was in that vicinity, that lower end of the boom that you put the 10 piles in 1912? A. Yes, sir. Q. There were no piles in the place of those piles you put in—it was new piling? A. Yes, sir. Q. And you extended the boom down to the south to the extent of the piling you put in? A. Yes. Q. And at that time the

(Testimony of Edward Webster.)

street had not yet been built? A. No, sir. Q. That was in the spring of 1912? A. Yes. Q. And it was the preceding year that you drove the piles for the fish-house somewhere along there? A. Somewhere along there—I could look it up. Q. It was before that, anyhow, that you drove the piles for the fish company? A. Yes. Q. And it was along about that time that you drove the piles for the Alaska Juneau Company? A. I don't just remember on that—I have got the dates. Q. I am not trying to get the exact dates—it was along about that time, either a little before or a little after? A. No; it was after. Q. It was probably a little after? A. Yes. Mr. HELLENTHAL.—I guess that is all. Mr. RUSTGARD.—I think that is all.

Witness excused. [77—9]

It was then conceded by both parties and stipulated to be a fact that the J. P. Jorgenson Company was a corporation duly incorporated; that during the month of July, 1911, the name was changed to Alaska Supply Company; that the Worthen Lumber Mills was duly incorporated; the receipt for the Territorial license tax was then offered and received in evidence as exhibit No. 2; the deed from the Alaska Supply Company to Worthen Lumber Mills was then offered and received in evidence as exhibit No. 3, and is hereunto attached.

[Testimony of H. S. Worthen, for Defendant.]

H. S. WORTHEN, a witness called on behalf of the Worthen Lumber Mills, being first duly sworn, testified as follows:

Direct Examination.

Mr. RUSTGARD.—Q. State your name. A. H. S. Worthen. Q. You live here in Juneau? A. Yes, sir. Q. How long have you been in Juneau? A. I came here the 24th day of February, 1913. Q. Do you occupy any position with the Worthen Lumber Mills? A. Yes, sir. Q. What position? A. Manager, president of the company, and treasurer. Q. The evidence shows that your company purchased the so-called Jorgenson Sawmill property from the Alaska Supply Company at about the time you came here. A. The papers were closed on the 15th of February, 1913. Q. You have been in charge of the property since? A. Yes, sir. Q. And are in charge of it now? A. Yes, sir. Q. What is the cost, as well as the reasonable value, of the sawmill property proper—that is, improvements that you have on there? A. Exclusive of the real estate? Q. Yes. A. About \$61,000.00. Q. With reference to the buildings and machinery? A. Yes, and dock. That is very nearly what it is carried on the books as actual cost. [78—10] Q. That is the actual money put into it? A. Yes. Q. I ask you to look at this map, marked Worthen Lumber Mills Exhibit No. 1, and I will ask you some preliminary questions. This place marked dry-shed, that is a part of the mill proper? A. Yes, sir. Q. Used for a dry-

(Testimony of H. S. Worthen.)

shed? A. Used for a warehouse for dry lumber.

Q. The place marked sawmill, that is the mill proper? A. That contains the sawmill, the planing-

mill, the engine-room, boiler-room, and also this shows the dry-kiln. Q. The dry-kiln is the part

closest to the street? A. Yes, projecting over the side of the building; that is the boiler-room (indi-

cating). Q. The part closest to the street and also farthest to the southeast is the boiler-room?

A. Yes. Q. And what is marked Dock here is the dock erected on pilings? A. Yes, sir. Q. And

what is this part looking like a ladder running in a southeasterly direction from the sawmill? A.

That is the log-slip. Q. That is where you haul logs up from the water into the mill? A. Yes, sir.

Q. And there is a place marked Boarding-house on the upper side of Franklin Street across from the sawmill—what is that? A. That is a ten-room room-

ing-house, rather boarding-house, which is used in connection with the boarding-house which is down

here (indicating). Q. Now, this marked Boarding-house, that is a ten-room rooming-house belonging

to the mill? A. Yes, sir. Q. And the place marked Boarding-house is the place on this map on the upper

side of Franklin Street across from the engine-house? A. Yes, sir. Q. That is also used by and

for the purpose of the mill? A. Yes, sir. Q. In operating this mill, describe to the Court in what

manner and by what method you bring the logs up to the mill? A. We use the tug-boat to get them

into what we call the pocket—it would be kind of

(Testimony of H. S. Worthen.)

a pond—bringing them in this way (indicating) along the beach from the southeast. [79—11]

Q. You come in along the south from the beach?

A. Southeast, in around this way (indicating) into the boom and then split open the raft, and hitch one side of the boom stick on this side, and the other on this side, and then feed the logs through there (indicating).

Q. Is there any reason why you cannot come up to the mill with the logs from the direction of Gastineau Channel and feed them in the mill that way? A. Can't hold them in the current.

Q. You mean the tide coming one way for a while, and then the other way— A. It usually sets this way; as near as I have been able to observe 22 hours out of 24 the tide is setting towards town.

Q. You cannot feed the logs to the mill from the direction of the center of the channel on account of the tide currents and waves both? A. No, sir.

Q. Now, then, if you come along your beach with your logs—that is, come floating them in the tide water along the beach, you are out of that tide current? A. Practically, still there is a little current always in the pond; enough so it moves the logs up to the mill—very slight.

Q. You said about 22 hours out of the 24 the current sets up towards the mill?

A. About that. Q. That is on account of an eddy, I suppose, formed by the tide coming around the mill here? A. No; I think it is formed more by the

eddy that goes back on the channel whenever the tide sets back in the upper bay here. There is a swing from somewhere down near Thane which

(Testimony of H. S. Worthen.)

comes this way on the beach (indicating)—practically this way all the time; out this way farther (indicating) the current is stronger. Q. Now, out farther from the mill the water is very deep? A. Yes, sir: Q. Too deep to set any piles? A. Yes, sir. Q. Have you any knowledge as to the depth of the water? A. I have only along the line of these dolphins (indicating); at extreme lowest low water this dolphin is about two feet out of water; horizontally, at the present time. The last piles we drove there were 98 feet long and lacked about six feet of being long enough. There was, the last time I measured—it was last fall—about 34 feet of water at that lower dolphin. [80—12] Q. At lowest low water there was about 30 feet? A. Yes, of course, it shoves off very rapidly from this point here (indicating). Q. It gets deep very rapidly as you go towards the channel from that point, and you cannot set dolphins any farther out? A. No. Q. Now, then, do you remember the distance from your southmost dolphin to the float of the Alaska Juneau alongside of their wharf? A. I wouldn't say exactly—there is approximately 140 feet. Q. Is that southernmost dolphin shown on this exhibit in position at the present time? A. That is a three-pile dolphin—the dolphin shown here—hemlock piles. Last year, in endeavoring to put a raft in here, we pulled it over to the middle, and this dolphin was caught in the middle, and this one can be seen at low tide; and we had two more piles driven—they are driven back about 35 or 40 feet this way

(Testimony of H. S. Worthen.)

(indicating). Q. You mean in a northwesterly direction? A. Yes, sir. Q. That much farther away from the Alaska Juneau float? A. Yes, but the old dolphin we broke is still hanging in there; you can see it at low tide; it tipped over and dropped between these three piles. Q. At the time you came here, Mr. Worthen, was Franklin Street from the northeast point of your dry-shed to the limits of the incorporated town constructed? A. Yes, sir. Q. It was constructed and in operation when you came? A. Yes. Q. Where it is now? A. Yes. Q. There is a place on the southerly side of Franklin Street marked on this map planked—How is that constructed, and what is it used for? A. It is constructed down to about this point (indicating) out of piling and posts. The COURT.—What do you call it on the map? A. It would be approximately the letter “K” in Franklin. We brought it down to here with posts, set by hand, and then it is covered with capping running this way, and floored over this way, and used it for piling lumber on. Q. That is, you put in bents of timber set by hand, on the ground? A. No; just posts set in the ground. [81—13] Q. Posts set in the ground by hand? A. Yes. Q. How many strings of these timbers did you set? A. Two. Q. One near the street and one approximately 16 feet from the street? A. Yes. Q. And you have capped over the two? A. No; the caps run lengthwise of the street. Q. Then you ran the caps parallel with the street? A. Yes. Q. Then you have floored over the caps?

(Testimony of H. S. Worthen.)

A. Yes. Q. Then your decking runs parallel with the street? A. Yes, sir. Q. Now, that is used for piling lumber? A. Yes, sir. Q. What time did you start putting that in? A. In March, 1913. Q. What further did you do towards putting that in? A. We set all these piles, commencing at a point right there (indicating). Q. The point you marked? A. Opposite the end of the slip. These piles had been driven previous to my taking possession. Q. The piles northwesterly from that had been placed prior to the time that you took charge? A. Prior to the time that I took charge. Q. And after you took charge, you proceeded to set timbers approximately at the end of the slip along the southerly side of Franklin Street? A. Yes, sir. Q. Now, then, state to the Court how you proceeded from that point—how long you were at it? A. We started in at that time to set posts approximately 16 feet—they vary; some 16 and 20, some only 14—down there to the point where the fish-house property and ours intersect, right here (indicating); then we start on this side and set along here and put timbers on and floored it over as we had time and lumber. Q. You started in March—do you remember what date? A. I don't remember the date; it was approximately about the 15th of March. Q. And you continued to set this first row of timbers along Franklin Street down towards the gridiron at the side of the fish-house? A. Clear to the gridiron. Q. That would be opposite the point marked on the General Grant lode showing the deepest indent into the country?

(Testimony of H. S. Worthen.)

A. Approximately that. Q. I have marked that fish-house. Now, then, after you had [82—14] done that, you started to set the other tier of timbers farther out—16 feet farther out? A. Yes, sir; approximately 16 feet.

Q. Now, how long did you continue that work? A. We continued that work until the injunction was granted stopping us.

Q. You had got down to the point marked on this map as the end of the planking? A. Yes, sir.

Q. Where you have drawn a pencil mark across Franklin Street, and you were doing that work at the time the injunction was served on you in the case of the Alaska Juneau Gold Mining Company against the Worthen Mills? A. Yes, sir.

Q. Do you remember the date of that? A. No, I don't, but I think it was the first days of August—I wouldn't say.

Q. That was shortly after you started a suit against the Alaska Juneau Company to stop them from washing their debris down in the boom down there? A. No, it was some 30 days after, I think; it was shortly after the suit was started for an injunction against their stopping up the boom grounds.

Q. Now, then, at the time that injunction was served on you, had you set the second tier of timbers from the fish-house up to the end of the planking, as far as it went at that time? A. Those were piling, driven.

Q. The water was deeper at that point? A. Yes, sir.

Q. Who drove those pilings? A. Alex Hart.

Q. What time did he drive them? A. I think it was the very last of July; I would have to look it up on the books.

Q. Do you remember how many

(Testimony of H. S. Worthen.)

piles he drove there? A. 65, I think. I will correct that—I think it was 45 piles that he drove there

—I will not state that positively. Q. At any rate, when the injunction was served on you stopping you from continuing this platform, you had both tiers of piles driven clear down to the fish-house?

A. Yes, sir; and part of them sawed off. Q. Part of them sawed off ready for the capping? A. Yes,

sir; there was an additional row of piling driven before I came here that was separate from either of those I put in. Q. The street rests partly on those? A. No, sir. [83—15]

Q. Do you remember how many piles you put from the fish-house up here after you came and started the work in March? A. That Mr. Hart

drove? Q. No; he drove the outside tier here.

A. He drove the outside tier up to about this point (indicating)—it was approximately, I think, 45.

Q. And you set by hand— A. We set on the inside all the way through; I think on the inside there are some 60 or 64 piles set along there. Q. That was in

addition to what had been set before you came to the country? A. Yes, sir. Q. Those that Webster

testified to having set there are still there, are they?

A. Yes, sir; with the exception of one; I think it was broken away when the bulkhead broke away.

Q. What is the capacity of your plant? A. The average cut last year was 41,000 a day; runs from 30,000 to 60,000 a day. Q. At the time the first

action was commenced—that is to say, action 1010—A, Worthen Lumber Mills vs. Alaska Juneau, what was

(Testimony of H. S. Worthen.)

the condition prevailing up on the hillside above the sawmill, as to work going on there? A. At the time the injunction was sought they were just commencing to sluice off the sidehill. Q. There was no mill on that sidehill at the time? A. No. Q. They just started to sluice off the sidehill for a foundation? A. Yes, sir. Q. When did they first turn on the water? A. I think it was the 28th day of June. Q. How long before you applied to the Court for an injunction in that case? A. The same day. Q. After the injunction, or the injunction *pendente lite* was granted in that case, what steps were taken to divert the water and the debris from the sluicing away from your booming grounds? A. Well, they constructed two different flumes and bulkheaded the street. Q. They bulkheaded the street? A. Yes. Q. In what direction did they turn the water and the debris by that flume? A. It was carried right down through under the street, most of it, right near the fish-house. [84—16] Q. The sluicing was going on on the hillside approximately straight above where your log slip is? A. Yes, sir. Q. At an elevation varying from 2 to 400 feet above? A. Yes, sir. Q. Then a flume was built diverting the water and the debris to the street and was turned into the ocean at approximately the fish-house? A. Yes, sir; I think it came right under the edge of the fish-house. Q. Now, how long after that did they first start to bulkhead, as you say, the street? A. Practically the same time. Q. Now, who bulkheaded the street, and how was that done? A. Why, the men who were

(Testimony of H. S. Worthen.)

supposed to be in the employ of the Alaska Juneau used plank and fastened them to the outer row of the street piling. Q. Have you a picture here that shows that situation? A. There was one taken at the time,

I think. Q. I show you a picture here, which is marked Defendant's Exhibit "B," used on the preliminary hearing, and ask you if that shows the bulkheading you refer to? A. Yes, sir. Mr.

RUSTGARD.—I offer that in evidence. (Whereupon said picture was received in evidence and marked Worthen Lumber Mills Exhibit No. 4 and is attached.) Q. Could you state now at approximately what time that picture was taken? A. I think the date is on it. Q. It was used at the preliminary hearing in this case? A. Yes, July 30,

3:25 P. M., 1913. Q. This bulkheading is shown to the right in the picture? A. To the right; yes, sir.

Q. The sawmill is in about the center of the picture? A. Yes. Q. And the string of dolphins you have referred to is shown to the left in the picture? A. Yes. Q. This picture is taken approximately from the Alaska Juneau wharf or the fish-house? A. I think it was taken from the end of this structure right here, the end of the wharf—that is, what we term the A. J. wharf. Q. This portion near the Alaska Juneau float on which is written in ink "A. J. Wharf" is simply a double set of piles with capping and a track running over it? A. Yes, sir. Q. And the wharf proper which they use for landing boats is lower down the channel? A. Yes, sir. Q. The right hand [85—17] corner of this picture shows the

(Testimony of H. S. Worthen.)

hillside on which the sluicing was started, or part of it? A. Yes, sir; part of the hillside. Q. This picture also shows a line or a string of houses on the upper side of Franklin Avenue—are those houses there yet? A. Yes, sir. Q. Some more built? A. Yes, been several built since then. Q. These houses are on the upper side, or shore side, of Franklin Avenue? A. Yes. Q. And the structure we see in front of these houses is what is marked on this map, Worthen Mills Exhibit No. 1, as Franklin Street? A. Yes. Q. I show you a picture marked Plaintiff's Exhibit No. 6, used at the preliminary hearing, and ask you in a general way what that represents? A. It was taken from a point approximately 200 feet below the boiler-room of the mill, looking down the channel and across toward Treadwell, showing the Alaska Juneau dock and the fish-house, and a portion of Franklin Street; and this on the left, the mill pond and the logs and part of the dolphin. Q. What time was that taken? A. 13th day of July, 1913. Q. The house to the left of the center of the picture farthest down the beach—what house is that? A. That is what we have always known as the fish-house. Q. That is the same property that is marked on this Worthen Lumber Mills Exhibit No. 1, as "Fish-house"? A. Yes, sir. Q. The pilings which are shown approximately opposite the fish-house on this picture—what piling is that? A. These along here are the piling that were driven on our ground, and these at the right were driven by the Alaska Juneau. Q. That is, on

(Testimony of H. S. Worthen.)

the shore side standing up high above the street were piles driven by you people? A. Driven previous to my coming here. Q. They are old piles? A. Yes.

Q. What is this railing or timber extending along the seaward side of Franklin Avenue? A. That is the railing the city put up along the street there.

Q. That timber is 4 x 4? A. Yes, sir. Q. How high above the street does that stand—above the docking?

A. I think it is approximately 44 inches. Q. And extends all the way [86—18] along that street on the lower side?

A. It did until we removed it when we built our planking. Q. Now, then, that planking you built was built for the purpose of using it for a lumber-yard?

A. Yes, sir. Q. And you are using it as such? A. Yes, sir. Q. It was necessary for that purpose?

A. Yes, sir. Mr. RUSTGARD.—I offer this picture, referred to by the witness, in evidence. (Whereupon said picture was received in evidence and marked Worthen Company's Exhibit No. 5 and is attached.)

Q. I now show you a picture, marked Plaintiff's Exhibit No. 5, used on the preliminary hearing, and ask you to explain, as near as you can, what that represents, and *from point* it was taken?

A. It was taken from the main Alaska Juneau dock, down at this point here (indicating). Q. You mean?

A. I think that is the westerly end. Q. It is taken from a point to the southeast of the float?

A. Yes, sir; looking up past the float through the log boom. Q. Had the float been put in at that time?

A. No, sir. Q. What are these piles in the foreground? A. Those are the ones that form the road-

(Testimony of H. S. Worthen.)

way or railroad track on the wharf proper. Q. And the house in the right center of the picture—that is, the largest house, that is the fish-house which has frequently been referred to? A. Yes, sir; the largest one. Q. And in the center of the picture, showing three smoke stacks is the sawmill plant? A. Yes. Mr. RUSTGARD.—I offer that picture in evidence. Mr. HELLENTHAL.—What is the date of that picture? Mr. RUSTGARD.—13th of July, 1913. (Whereupon said picture was received in evidence and marked Worthen Lumber Company's Exhibit No. 6 and is attached.) Mr. HELLENTHAL.—Were those pictures all taken on the same date? The WITNESS.—No; I think one was taken on the 30th. Mr. HELLENTHAL.—The first one was taken on the 30th? The WITNESS.—I think the first one was taken the 30th of July, and the others the 13th, if I am not mistaken. Q. (By Mr. RUSTGARD.) After the injunction was granted and after this flume line was installed carrying the water and debris down towards and under the fish-house, was anything washed in the street from the hillside? A. Yes, sir. Q. To what extent? A. It filled up within probably an average of two and one-half or three feet to the planking of the street [87—19] Q. That was inside the bulkheading? A. Yes, sir. Q. And outside the bulkheading what was done? A. Quite a lot of silt and sand leaked through. Q. That leaked through? A. Yes; the bulkhead broke away twice with them—I think three times;

(Testimony of H. S. Worthen.)

and several times it washed over the top. They commenced at the bottom to build this bulkhead, and sometimes it would fill up faster than they planked and it would run over the boom ground.

Cross-examination by Mr. HELLENTHAL.

Q. Mr. Worthen, you know that that bulkhead broke accidentally up there, don't you, and that the rock and stuff came through by accident?

A. I don't think anyone did it purposely. Q. The boards just simply gave away—the weight got a little too heavy for it and broke them down. A. The piling that supported the street gave way. I don't think it was done purposely or intentionally.

Q. And the place where that silt was deposited or where the bulkhead broke, was at the lower end near the fish-house? A. No; it was approximately 200 feet—the worst break—this side. Q. About 200 feet this side of the fish-house, you mean? A. Yes, sir.

The COURT.—That is the northeast? A. Coming towards the mill of the Alaska Juneau. Q. (By Mr.

Hellenthal.) Now, you say Alex Hart drove some piles for you after you came here, in the year 1913, along a line marked on this map nearly parallel with the street? A. Yes, the outer row next to the street.

Q. That is the outer row of the two rows next to the street? A. There are three rows there.

Q. Well, anyhow, the principal driving that he did was near the street? A. No, farthest from the street. There is a row of piles that isn't shown on this plan right next to the street; there is a row here (indicating) driven before I came here; these (in-

(Testimony of H. S. Worthen.)

dicating) represent what Mr. Hart drove, this row, the outer row of the three rows next to the street—he didn't drive any out here (indicating)? [88—20]

Q. Didn't he at some time drive out seaward to replace some others? A. No, sir. Q. When was that done? A. Mr. Webster did that. Q. After you came here? A. Yes, sir. Q. After you came here,

some piles were driven out on the seaward side of the boom? A. Commencing about here (indicating), these broke away that same season—nearly all of them broke away and went adrift and Mr. Webster's driver came in and replaced them; however, not the lower four; the lower four were not replaced that year. Q. Have they been replaced since? A. The lower one was replaced last fall. Q. Of the piles in the ground as they now exist, the lower one was driven last fall and some of the piles further towards the mill on the seaward side of the boom were driven a year or so ago? A. Those are what we call the dolphin piles driven in the fall of 1913. Those were to replace the ones that went out. We had a storm and a lot of them went out. Q. What time in the year was that? A. That was in the year of 1913. Q. Now, when you say that you cannot feed the logs from the channel side, you mean by that, Mr. Worthen, as I understand it, the general trend of the current is northward up the channel? A. I cannot tell—it comes this way towards town. Q. Of course, if you rely upon the current to bring the logs to the mill you have to have the logs so situated that the current will take them to the mill? A. When they

(Testimony of H. S. Worthen.)

are not in the boom the natural trend is from the mill; we have to pull them up at the lower end near the mill. Q. But the natural trend of the logs is up current toward the mill? A. Yes, sir. Q. So, having the logs in the boom instead of having them out in the center of the channel, it saves that much pulling getting them to the mill? A. Yes; of course logs would lay crosswise. Q. If they were lying crossways they would go with the current unless you had them made fast? A. Of course, the resistance is a great deal greater lying crosswise than it is lengthwise of the logs. Q. However, the log boom doesn't extend out to the center of the channel, does it? A. How is that? Q. The log boom doesn't extend out to the [89—21] center of the channel, does it? A. Oh, no. Q. Wherever you had your boom, you would have to run alongside of the shore so the current would be toward the mill—that is true, isn't? A. I didn't catch that last. Q. I say, your boom would necessarily have to be along the shore so that the logs would be fed from the current—would drive them towards the mill? A. That would be the practical way. Q. That is the way it is done, isn't it? A. Yes, that is the way we are doing it now. Q. The current, however, isn't very strong one way or the other, Mr. Worthen, there? A. No; not in close to the shore, inside of the dolphins. Of course, the nearer you get to the shore the less current there is. Q. And the current is not very strong if you get in the middle of the channel, is it? A. Oh, yes; there is quite a current in the middle of the channel.

(Testimony of H. S. Worthen.)

Q. Of course, there is more in the middle of the channel than there is towards the shore? A. Yes.

Q. The last two pictures introduced, Mr. Worthen, were taken on July 13th, 1913, and the other one on July 30th, was it not, of the same year? A. I am only testifying to that from memory and what is marked on the pictures; I cannot testify to the date; I never refreshed my memory by looking at anything.

Q. That is your recollection? A. Yes. Q. You are pretty sure of that being correct, July 13th, 1913?

A. Yes, sir. Q. Two of them the 13th, and one the 30th? A. Yes, sir. Q. The first picture introduced

being the one taken on the 30th, and the other two on the 13th? A. Not taken at the same time. Q.

Taken about two weeks apart? A. Something like that. Q. Now, Mr. Worthen, you are not a mining

engineer, are you? A. No, sir. Q. Now, as a matter of fact, after hearing the testimony of Mr.

Bradley and Mr. Kinzie you were more frightened than anything else when that injunction suit was

brought—you were more frightened than the facts really warranted? A. I don't think so. Q. Don't

you think now if you had it to do over again you wouldn't bring the suit at all, knowing as much about the operations as you now do? A. I don't

[90—22] think so; I still think I would do the same thing. Q. You still think the stuff coming down

from above hurts you? A. I still think the—

Q. Knowing what you know about the situation now, you know more about it now than you did at that time, do you not? A. I have seen the way they

(Testimony of H. S. Worthen.)

changed their program and know more about what they have done than I knew what they were going to do. Q. That conversation you had about that water coming down was a casual conversation, wasn't it?

A. Just as I repeated it here. Q. You paid no attention to it at the time? A. We were watching it all the time.

Q. Said more in a joking manner than any other way, wasn't it? A. I didn't take it as a joke.

Q. You didn't take it very seriously? A. I took it seriously enough to keep watch.

Q. You didn't take it seriously enough to speak of it when the question was up on the preliminary hearing?

A. I was not asked anything about it. Q. And you didn't think it was serious enough to inform your counsel of it at the time?

A. I think I did—I won't say as to that. Mr. HELLENTHAL.—I don't think I care to examine any further.

Redirect Examination by Mr. RUSTGARD.

Q. At or about the time you commenced the first action, 1010-A, state whether or not there was a big slide there? A. Yes, sir, there was.

Q. Describe to the Court about the behavior of that slide—how near it came to crushing some of the houses along Franklin Avenue? A. It let go, I would say, about two-thirds of the length of their operations to the east,

about two-thirds of the way down the slide broke away and it came down just to the brink overlooking the houses on Franklin Avenue. Q. How much earth, approximately, would you say was in that slide? A. Oh, testifying from memory, I would say there was about 250 or 300 feet wide, and probably

(Testimony of H. S. Worthen.)

five or six hundred feet long; and anywhere from, I should say, 6 to 8 or 10 feet deep. Q. That stopped just at the brink of the hill overlooking the cabins along the side of Franklin Street? A. Yes, sir. Q. And right above your log boom? A. Yes, sir. Mr. RUSTGARD.—That is all. Q. (By Mr. HELLENTHAL.) That slide didn't hurt anybody, [91—23] did it, Mr. Worthen? A. No, sir; not physically. Q. (By Mr. RUSTGARD.) Another question. Since that time they have built the mill on this property? A. Yes, sir. Q. And they promised to continue to extend it—talk about extending the mill? A. I have heard that talked, but never to me. Q. Now, at that place they are crushing quartz taken from the mines on the Alaska Juneau property up in the basin? A. Taken from the mine. Q. From the mine of the company up in Gold Creek basin on the other side of the mountain? A. Yes, sir. Q. And the tailings from that mill are now conducted along the flume where they wash the debris which you have already described? A. It is near the same location; they have a new flume now. Q. And those tailings are washed into the sea at about where the fish-house is? A. They have been depositing them from the fish-house on south. Q. Further south on the beach? A. Yes. Q. You have gotten the benefit of some of it? A. Yes; some of it. Mr. RUSTGARD.—That is all. Mr. HELLENTHAL.—That is all. (Witness excused.)

[Testimony of Edward Webster, for Defendant.]

EDWARD WEBSTER, a witness recalled, having been previously sworn, testified on behalf of the Worthen Lumber Mills, as follows:

Direct Examination by Mr. RUSTGARD.

Q. Mr. Webster, this forenoon you testified to driving some piles for the Alaska Juneau near the fish-house and at the place you call the wharf, the same being a string of piles supporting the track. A. Yes. Q. Now, have you refreshed your memory as to the time when you drove those piles? A. I didn't look that up—I looked up when we started the wharf in there, this was along in the fall of the year; it may have been in June or July when we drove that line of piles out there. Q. What year? A. 1913. Q. This forenoon you said 1912, didn't you? A. I said I wasn't sure, yes, sir. It was 1913. Q. If you said 1912 this forenoon you were mistaken? A. Yes, sir. Q. What time did you start driving the piles for the main wharf marked on this map "Warehouse"? A. May, 1913. Q. That shaded portion marked "Warehouse,"—that is the main wharf where the Alaska Juneau is? A. Yes, sir. Q. That stands on the wharf? A. Yes, sir. The COURT.—When did you say you began that? [92—24] A. In May, 1913. Q. You finished driving the main wharf before you came up with your pile-driver in the direction of the fish-house? A. Yes; if I remember right we were over to the Island doing some work, and then came back on that piece afterwards. Q. That is, first you drove the main wharf marked "Warehouse"?

(Testimony of Edward Webster.)

A. Yes. Q. And after that yu went to the Island to do some work? A. We drove a line out here (indicating) for part of their track there, then we came back from the Island and tore out the line there (indicating), and went inside and drove the track, along in the fall of the year—this line here (indicating), and some piles went out from here and tore this part of the track out and we went in here and drove a line of piles outside here. Now, if I mistake not, it was in June or July, and they came out on us—the water was too deep—we couldn't hold them down—we changed it and Mr. Hart drove it in on this side. Q. That was after this litigation started that you drove these piles right straight out in the direction of the channel? A. I don't remember whether it was after that or not. Q. You don't remember? A. No. Q. But you know about the piles which were driven to support the track immediately southeast of the fish-house? A. Yes. Q. And at the corner where the float is now shown to be? A. Yes, sir. Q. That was some time in the summer of 1913? A. Yes; in the fall of 1913 or summer of 1913—we were there two or three different times on the work. Mr. RUSTGARD.—That is all I wanted you for, to correct the date. Mr. HELLENTHAL.—No questions. (Witness excused.)

[Testimony of Grafton Coleman, for Defendant.]

GRAFTON COLEMAN, a witness called on behalf of the Worthen [93—25] Lumber Mills, being duly sworn, testified as follows:

Direct Examination by Mr. RUSTGARD.

Q. Your name is Grafton Coleman? A. Yes, sir.

Q. You live in Juneau, Mr. Coleman? A. Yes, sir.

Q. How long have you lived in Juneau? A. I came here in the spring of 1911 and I have been here practically all the time except probably three or four months.

Q. Do you remember when Franklin Avenue was built? A. I do. Q. That is, passed the sawmill down towards the city limits? A. Yes, sir.

Q. What time was that built? A. That was built in 1912—started work about the latter part of June—just the exact date, I don't remember. Q. 1912?

A. Yes, sir. Q. The work proceeded from near the city and extended in a southeasterly direction? A.

Yes, sir. Q. They commenced from the northwesterly end? A. Right close to the sawmill dock; yes, sir.

Q. Proceeded to plank it—that was built by the city of Juneau? A. Yes, sir. Q. And from the end of Franklin Street at the limit of the city, the Government continued the road on to Sheep Creek?

A. Yes, sir. Q. Where were you employed in 1912, in the summer? A. Worked for the Alaska Supply Company in the sawmill.

Q. That is what was known as the Jorgenson Mill, the same mill as the Worthen Company operates now? A. Yes, sir. Q. Will you describe to the Court in what manner the sawmill was operated that season with reference to floating logs

(Testimony of Grafton Coleman.)

up here? A. It was operated about the same way it is now; they had the pond or pocket there—was piled in—and the logs were taken in at the lower end down by the fish-house and floated in endways. Q. Now, the log booms would be floated in along the beach into this pocket formed by the dolphin as an outer guard?

A. Yes, sir. Q. At that time, in 1912, was there any other obstruction in the water except the fish-house?

A. On this side of the fish-house they had a little grid-iron there. Q. That is for the purpose of placing

scows on, or boats, for repairs? A. Yes, sir; there were three fishermen there—they used to put their boats on there to be repaired. Q. That fish-house

was standing on piles? A. Yes, sir. Q. This grid-iron is three or four planks supported by piles, low enough to put a boat on [94—26] it at high tide?

A. Yes, sir. Q. This Alaska Juneau wharf was not there at that time? A. No, sir. Q. At that time there was a free ingress along the beach in from this mill-pond with the exception of that fish-house? A.

Yes, sir. Q. Nothing else? Do you remember the time when this planked platform on the southwest-erly side of Franklin Avenue was erected? A. Yes,

sir, approximately. Q. What time was it erected?

A. That was in the summer of 1913. Q. Did you work on that? A. No, sir. Q. Do you remember

when they started? A. Well, I don't remember the date; they started fixing up the mill, and when they had the mill almost completed they started on this and they worked on it right along—I don't remember what the time was. Q. Built it as fast as you got the

(Testimony of Grafton Coleman.)

lumber? A. Worked there practically all of the time on it—two men, and sometimes be off for a little while and then work again. Q. Until you were stopped? A. Until the injunction came up; yes, sir. Mr. RUSTGARD.—I think that is all.

Cross-examination by Mr. HELLENTHAL.

Q. Mr. Coleman, in 1912, you say there were no structures on the beach; you mean that, extending into the water—you know the old Chief Johnson house and the Jimmie Bean house, they were there, weren't they—I mean up on the upper part? A. Why, yes, there were a good many shacks along the street there. The COURT.—I didn't understand, Mr. Coleman, that you were asked anything about that. Q. Extending into the water is all you mean? A. Extending into the water is all. Mr. RUSTGARD.—The Worthen Lumber Mill rests.

ALASKA JUNEAU COMPANY'S EVIDENCE.

Mr. HELLENTHAL.—We will put in our record evidence first. (Whereupon was received in evidence Exhibit "A," which is a notice of location of Abe Lincoln Ledge, giving date of location as — and recorded —; Exhibit "B," certificate of location of Abe Lincoln Lode, which gives date of location as — and recorded —; Exhibit H.1. Location Notice of General Grant Lode, which shows claim was located in 1895. [95—27] Exhibits "C" to "S" inclusive, which show transfer of title from the original locators of Abe Lincoln and General Grant Lodes to the Alaska Juneau Gold Mining Co. These exhibits also show that prior to 1902, J. P.

(Testimony of St. Clair Johnson.)

Jorgenson Co. owned a quarter interest in said lode claims and in that year conveyed its one-fourth to plaintiff's predecessors in interest. They also show that Henry Shattuck owned a one-fourth interest in General Grant lode, which he in 1912 conveyed to plaintiff.)

[Testimony of St. Clair Johnson, for Plaintiff.]

ST. CLAIR JOHNSON, a witness called and sworn on behalf of the Alaska Juneau Gold Mining Company, testified as follows:

Direct Examination. By Mr. SIMON HELLEN-
THAL.

Q. What is your name? A. St. Clair Johnson. Q. You are living in Juneau? A. Yes, sir. Q. How long have you lived in Juneau? A. Well, I came here—I was down to Sitka before and when first strike Juneau I come over here. Q. You were over at Sitka first? A. Yes; I was living at Sitka first. My father used to be at Sitka and my mother, and then afterwards they strike Juneau and I come down here. Q. About what year was that—how long ago? A. Well, it was the time I come down here—I just begin to tell what I do first before I explain something else. I strike Juneau, and I go back to Sitka—Sitka Mission Home; as soon as I got out again I come again to Juneau and stay right here twenty-five years—Juneau. Q. Stayed twenty-five years in Juneau? A. Stayed twenty-five years in Juneau. Q. Do you remember the year that you left the Sitka school? A. It was 1888. Q. You have been in Juneau since that time? A. Since that

(Testimony of St. Clair Johnson.)

time in Juneau all the time. Q. You say you had been in Juneau before that time? A. Before that time I been in Juneau. Q. About the time the white men came? A. Yes; I been here at the start, then I went back to Sitka to school. Q. Did you know Chief Johnson? A. Yes, sir. Q. Do you know where he lived? A. I know, yes. Q. Did you know Chief Johnson's older brother? A. Yes; I know his brother. Q. Did you know Chief Johnson's older brother's wife? [96—28] A. Yes, sir; I know his wife. Q. Do you know Jim Johnson, Chief Johnson's younger brother? A. Yes, sir. Q. Do you know Tom Johnson? A. Tom Johnson, that young man? Q. Yes. A. I know him; he was a little boy when I come from Sitka. Q. Did you know them the first time you were in Juneau? A. Yes, sir. Q. You saw Chief Johnson living there the first time you came to Juneau? A. Chief Johnson lived down there at Taku on this side; and then as soon as they commenced to strike Juneau, he moved down to the beach down there. Q. Down near where the fish-house is? A. Yes, where the fish-house is at the beach there. Q. Was that the identical place he first moved to? A. Yes, all the time. Q. Where did Chief Johnson's older brother move to? A. Same place together. Q. Did he live this side of Chief Johnson or the other side of Chief Johnson? A. This side. Q. Do you remember what they were engaged in the first time you were in Juneau—what they did? A. No, sir. Q. You don't remember what they did? A. No, sir. Q. Do you know

(Testimony of St. Clair Johnson.)

Jackson? A. Yes, sir. Q. Did he live right near there? A. Yes, sir; he lived right there. Q. What way from Chief Johnson did he live? A. A little farther down this way. Q. Next to him, and just beyond? A. Yes; all the time. Q. Was he living there the first time you were in Juneau? A. Yes; and his father—his father used to be living there the first time, and he stayed there, too—his father stayed a long time. Q. When you came back from Sitka in 1888, these people were still living there? A. Yes. Q. Chief Johnson still living in the same place? A. Yes. Q. And Chief Johnson's oldest brother this side of Chief Johnson? A. Yes, together. Q. And Jackson lived on the other side? A. Yes; on the other side; Jackson and his father used to live there; his father until his father died, and he built a new house there. Q. When you came back from Sitka, what did Chief Johnson do, if you know? A. All I know, Chief Johnson stayed right there; he got stuff to sell all around, all over—he got a schooner and sent [97—29] them all around. Q. He was trading? A. Yes, trading; yes. Q. He had a schooner, you say? A. He had a schooner, because I seen it. Q. Where would he land with his schooner? A. Right in the place down on the beach—the tide-land. Q. Near where the fish-house now is? A. Yes, sir; where the fish-house is, tied up right there. Q. How long did Chief Johnson continue to do that? A. That is all—I told it that way, because I know where Chief Johnson stayed. Q. When you came here in 1888, was he landing there with his schooner? A.

(Testimony of St. Clair Johnson.)

Yes; his house right in there yet. Q. Did he continue to land there with his boat as long as Chief Johnson lived? A. Yes, sir; as long as he lived, what kind of boat he got he put in there. Q. How many boats did Chief Johnson have? A. First he have a schooner, then he ain't got that all the time; he keep the schooner not long—not much good, then after he sold it he got another one, a green one, green paint on it, and then he got a gas boat—gasoline—he ain't got that boat all the time—and he tied them up right there—his boats, because he lived there. Q. And what did the other Johnson do—what became of Chief Johnson's older brother, if you know? A. Together they stayed there. Q. Yes, and how long did Chief Johnson's older brother stay there? A. That is all I know, but Chief Johnson's brother stayed there—they moved out together, because they had to make garden—in that time it not like this time at all, because I know they belong to these people they have to clean up and make some little garden in there, but Chief Johnson got a good deal of business all around, but this man stay there all the time, he and his wife stay all the time and make a little garden. Q. That was Chief Johnson's older brother? A. Yes; and his wife. Q. Did he use the beach at all? A. Yes; he had to have boats, so he tied up there. Q. How long did Chief Johnson's older brother live after you came from Sitka? [98—30] A. Why, he had to live just as long as he lived there. Q. He lived there all the time? A. Yes, right at Chief Johnson's house. Q. Did his wife live there? A. Yes, sir. Q.

(Testimony of St. Clair Johnson.)

Did his wife continue to live there after he died?

A. Yes, and his other brother. Q. That is, after he died his younger brother came and married his wife?

A. Yes. Q. Is that Jim Johnson, the man you know?

A. Yes, sir. Q. Did they continue to live there? A.

Yes, his wife used to work there—she cleaned out ground and used to work around here because the man had to do something—fishing and that kind of work; sometimes they stayed there, and sometimes

were out again, but the woman she used to be with her husband. Q. When they went out, did they go

on foot or in the canoe? A. In their canoes, and

when they came back again, tied up their boat on the beach. Q. Did Tom Johnson live there with them?

A. Yes; he was a little kid when I came. Q. Now,

do you know Jimmie Bean? A. I know him. Q.

Did Jimmie Bean ever have a house in that locality,

or a place in which he lived right near there? A.

Jimmie Bean is there and his younger sister, and all

his family is dead, and he puts them in the graves in

the other place, and that is the reason he went and

claimed it; you see all the graves, that is the reason

he moved that and went up there. Q. That is the

reason he moved? A. Yes, sir. Q. And he claimed

the ground? A. Yes, sir. Q. Was that just this

side of Jim Johnson's house? A. Yes, sir; down on

the beach. Q. Now, while Jim was living there, did

he use the beach? A. He stayed there sometimes,

because I know what he is doing and he know what

he is going to do there just the same as all people, and

he got his friends all dead and laying in the graves,

(Testimony of St. Clair Johnson.)

and that is the reason he had all the ground. Q. He didn't let anybody come in this place—he didn't allow anybody to go in that place? A. No, sir; that is the reason he didn't allow nobody. [99—31] Q. About what time was that? A. Jimmie Bean and his brother have a house together. Q. Was that in 1888? A. Before I come. Q. Before you came here? A. Yes; they moved down here, that is the reason, as long as I go past I see them. Q. Did you see them when you came here the first time? A. Yes, sir; the first time I come here I see them. Q. And when Jimmie Bean would come and go, would he go with his canoe, and tie his canoe up there? A. Yes, sir. Q. Now, the Jacksons that you speak of—what use did they make of the upland—did they garden on the upland? A. Yes, right up a little further, up on the top of the house they used to make a little garden—Jackson. Q. Did they make any use of the beach in front of their house? A. Yes; they have to use it, because they had to have a boat tied up in the water many years. Q. The Jacksons were there when you came here? A. Yes, sir; the Jacksons were there. Q. Did they continue to live there a long time? A. Yes, sir. Q. Do you remember how long they continued to live there? A. Well, I will have to explain to you how I know about it. As soon as I come from Sitka, 25 days I stay in Juneau, I saw these people all the time I passed there—saw them right there; sometimes I call down there, and I could see the same people all the time whenever I go there—go past. Q. Do you know whether or not Mrs. Jackson

(Testimony of St. Clair Johnson.)

lived there until she sold to the Alaska Juneau? A. Yes.—Mrs. Jackson? Q. Yes. A. When? Q. Two years ago. A. Well, I heard that, but I couldn't keep track of her. Mr. HELLENTHAL.—That is all.

Cross-examination by Mr. RUSTGARD.

Q. How old are you? A. I couldn't catch the date, I couldn't tell you. Q. Have you ever heard how old you were? A. I was not born in Sitka, I was born at Haines. Q. Haines Mission? A. Yes, away up in Haines. Q. How many years ago? A. I couldn't tell you how many years ago I was born; cannot keep track of it. Q. From Haines, where did you go—where did you go after you left Haines Mission? A. My [100—32] father used to go up to Haines Mission, and I belonged to him, and that is the reason my father used to go up there; then I moved down to my father's home in Sitka. Q. How old were you when you went to Sitka? A. I couldn't tell you how old I am when I went to Sitka. Q. How long did you stay in Sitka before you came to Juneau? A. Oh, I left Sitka just as soon—I was a little kid, then, when I left. Q. How old were you when you came to Juneau first? A. Well, I guess about 15—I guess about 15. Q. When you came to Juneau the first time? A. When I came to Juneau the first time; I couldn't tell anything, I couldn't work. Q. How long did you stay in Juneau before you went back to Sitka again? A. Well, I stayed in Juneau about two years and I go back to Sitka. Q. When you lived in Juneau, at that time, where did you live? A.

(Testimony of St. Clair Johnson.)

Juneau? Q. Yes; where did you live—where did you and your father live when he had you here? A. Oh, Sitka. Q. When you were here, wasn't your father here? A. No, I come with somebody else. Q. Who did you come with? A. Of course, I come with many people—Indians—come to see Juneau. Q. Where did those Indians live when they came here with you? A. Right here at Gold Creek, right here in the village. Q. North of here? A. No, just here at Gold Creek. Q. Taku Village? A. No; Auk Village right at Gold Creek, where village is this time. Q. You went back to Sitka and went to school? A. Yes, sir; I went back to Sitka. Q. How long did you go to school there? A. I stayed there in the Mission about 5 years. Q. Who were running the Mission at the time—who was the teacher in charge of the Mission? A. The superintendent down there. Q. Mr. Kelly, the fellow with the long whiskers? A. Yes, sir. Q. And do you know what year you came back here from Sitka? A. I come back here in 1888. Q. How do you know that? A. Because I have to live that way. Q. You remember that? A. Yes; that is all I remember. Q. When you came back here to Juneau, where did you live? A. I lived right in Juneau. Q. In the Indian village here? [101—33] A. In the village. Q. Auk Village? A. Yes, sir; Auk Village. Q. Where are you working? A. Oh, all around; I work every place, I have to work every place, all around. The COURT.—He asked where are you working now? A. Why, yes, I work at the Alaska

(Testimony of St. Clair Johnson.)

Juneau. A. How long have you worked for them?

A. For quite a while—I worked there all the time, but this time I work about two years. Q. Been working for about two years? A. Yes, this time.

Q. Working down on the beach here? A. Sometimes work on the beach, sometimes work on the other side in the basin. Q. How many times have you been a witness for them in court? A. Never been a witness at all.

Q. Now, you talk about Chief Johnson—don't you know that Chief Johnson built a house farther up town? A. Yes, sir; a big house. Q. Didn't he move in and live there? A. Yes, he moved in the big house.

Q. What time did he build that big house farther up town here? A. I couldn't tell you what time he built that big house—when he built it I see it. Q. How long after you came from Sitka did he build it? A. When I first come from Sitka Chief Johnson stayed down in a little house, after he built his new house—this house up here—built a big house, and I saw him build it.

Q. How long after you came back from Sitka did he build the big house? A. I don't remember that at all, how long. Q. A year or two? A. Oh, four years, I guess, maybe four years—that new house there had just opened first.

Q. That is, the big house here on the hill, two thousand feet further north from where he lived before that—north of the mill. That big house was north of the sawmill, wasn't it? A. These people know how to come. Q. You know where Chief Johnson's big house is? A. Yes, sir. Q. That is north of the sawmill, isn't it—northwest of the sawmill—this side of

(Testimony of St. Clair Johnson.)

the sawmill, isn't it? A. Yes. Q. And where he lived before is on the other side of the sawmill? A. Yes, sir; on the other side, right down there. [102—34] Q. When he moved into the new house, where did he tie his boat? A. He tied at the same place. Q. Tied them right in front of his house, didn't he? A. The other house way down. Q. After he moved into his new house, didn't he land his boat in front of his own house? A. No, sir; because down on the beach too rough, they have to keep out of the way all the way down. Q. Chief Johnson was away from home a good deal of the time, wasn't he? A. Yes, sir. Q. He sailed around and traded? A. Yes, sir. Q. Sold goods to the Indians? A. Yes, sir. Q. He had a house down at Taku, too? A. Yes, sir. Q. The little village there? A. Yes, sir. Q. Sometimes he stayed in that house? A. Yes; in that house, and then come back again. Q. Way down at Taku Inlet, Point Bishop? A. Yes, sir. Q. Did he have a house anywhere else? A. Yes, this house. Q. He would sometimes stay in his house here and sometimes at Taku Inlet—did he have a house in any other place—did he have a house in Hoonah? A. No; he had a house way down this side of Taku; he was going to build a house—big one, and after he started his working and cleaned out for big house, he drowned—he couldn't work it—he was going to move out of the big house out there, but he was too late, and he drowned. Q. He was going to take the other Indians down with him to that place? A. That place way down? Q. Yes. A. Well, first

(Testimony of St. Clair Johnson.)

he had his work to do before he told it to people what he is going to do, and he got to finish his work before he tell all his friends. Q. Now, where is Jimmie Bean now? A. Jimmie Bean up in the Taku River, trapping. Q. Trapping? A. Yes. Q. How long has he been gone? A. I don't remember that; I work all the time, I don't know where he go. Q. All the Indians were in the habit of going out trapping in the winter? A. Yes, sir; trapping in the winter. Q. Fishing in the summer? A. Yes, sir; fishing in the summer. [103—35] Q. And they used to have a house wherever they trapped? A. They don't have a house like this house here—a little shack or a cabin, sometimes. Q. Now, how long did Jimmie Bean live down there? A. Where? Q. Down at the lower end of town here? A. Jimmie Bean and his father they used to stay down there, as long as he come down from way back on the river—he stayed with his father right there—he used to stay with his father. Q. Jimmie Bean claimed all the graves up on the hillside there? A. Jimmie Bean used to be staying all the time with his father, and his father told him whenever your sister dies, or your brother, or anybody else, your friends, you bury them right there in the graveyard. You remember that—he told his son, “You remember that nobody must come around after it, to get this place,” and Jimmie Bean watched to see somebody didn't come around. And then down the beach he got a post like that there, and put that up on top of a little bit of a hill there—put that post there. Q. When did he put that post there? A. I

(Testimony of St. Clair Johnson.)

think it was pretty near two years ago. Q. Two years ago? A. Yes; one man worked there and put a post there. Q. That was at the time he knew he could get some money for it? A. Yes; because it belonged to himself. Q. Well, a good many of the Indians moved back there about two years ago to sell that ground, didn't they? A. This place? Q. Moved back there and wanted money for the graves and the ground, didn't they? A. I couldn't say that, because they knew that they do; they knew themselves what they do; they didn't move much, they stayed down there, and when the old house blew down, they moved to Douglas, the other side. Q. Now, how long did Jim Johnson live there? A. Jim Johnson? Q. Yes. A. Why, Jim Johnson, of course his brother used to live there—Jim Johnson's brother, just the same thing, and he lived there until his brother died, then he had to go alone again. [104—36] Q. That is, until Chief Johnson, you mean, died? A. Chief Johnson's oldest brother. Q. When did Jim Johnson start living down there? A. As soon as this man died, he have to pick it up. Q. How long has that been? A. I couldn't tell you how long. Q. Where is Jim Johnson—here? A. Jim Johnson right here in Juneau. Q. When did he move away from there? A. Jim Johnson? Q. Yes. A. Well, I couldn't tell you, but I remember that he used to live there. Q. His brother used to live there? A. Yes.

[Testimony of Tom Johnson, for Plaintiff.]

TOM JOHNSON, a witness called on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. SIMON HELLEN-
THAL.

Q. What is your name? A. Tom Johnson. Q. Where do you live, Tom? A. I lived right below the sawmill. Q. Where do you live now? A. I live in Douglas. Q. What was your father's name? A. His name was Johnson, a brother of Johnson. Q. A brother of Chief Johnson, was he? A. A brother of Chief Johnson. Q. Was he the elder brother of Chief Johnson? A. Yes, sir. Q. Your mother, who is she the daughter of? A. Mrs. Jackson. Q. Who is your mother living with now, since your father died? A. She is living with Jim Johnson now, the youngest brother of Chief Johnson. Q. Where did you live in Juneau? A. Oh, we live in Juneau—my family lived there about one year after they discovered Juneau. Q. Whereabouts did they live? A. Right below the sawmill. Q. Was that near the fish-house? A. Yes. Q. Which way from the fish-house? A. On the down side, on the town side? Q. Town side from the fish-house? A. Yes. Q. Was it right next to Chief Johnson there? A. Yes; the old house Chief Johnson used to have. Q. Was it just this side of him and adjoining him? A. Yes, sir. Q. How long did you live there? A. Well, that is what my family told me, they lived there one year after they discovered Juneau. Q. Do you remember yourself of liv-

(Testimony of Tom Johnson.)

ing there? A. At the time my father died I was about nine years of age—we lived there a couple of years, and then moved over to Douglas. [105—37]

Q. You lived there a couple of years after your father died? A. Yes, sir. Q. Did you continue to claim the property after you moved away. Mr. RUST-

GARD.—I object to that as incompetent, irrelevant and immaterial and leading. The COURT.—The

question is leading; I don't think it is material whether he continued to claim it or not. Q. About

two years after that you say you moved to Douglas? Do you remember about what year it was your father

died? A. Well, I am 28 years of age now; my father died when I was nine years of age. Q. That was

about 19 years ago then—did you have anybody looking after the property after you moved away? A.

Let my old grandmother look after it, Mrs. Jackson.

Q. Did she live near the property? A. She lived

right on this side. Q. Right on the other side of the Chief Johnson house? A. Yes; on the lower side.

Q. At the time you moved off of the property, was there a house on it? A. There was a house on it, and

later on they tore it down. Q. About how many

years after you moved out? A. I don't remember just the very date, because, you see, I was pretty

young; I know they tore it down; we had a garden out in front of our house, a little garden, and on this

side of the garden they had some kind of a shed for their canoes—my father used to keep a big canoe.

Q. You had a place there to keep a big canoe? A.

Yes. Q. Did you continue to keep that garden up

(Testimony of Tom Johnson.)

after you went to Douglas? A. No; we didn't do

anything on it. Q. Do you remember what use was made of the beach by Chief Johnson—you were acquainted with the Chief Johnson property as well, were you not? A. Yes, sir. The COURT.—You

mean the present Chief Johnson property? Mr. HELLENTHAL.—The Chief Johnson property lying alongside of the property he just testified to.

The COURT.—That is to say, where the fish-house was? Mr. HELLENTHAL.—Yes. Q. Do you remember what use Chief Johnson made of that property?

A. Where the fish-house is now? Q. Yes. A. Well, he used to keep his schooners there, that is all I

[106—38] remember. It used to be in the olden times they would put up a post in the place, the way they used to do, then if there was anything below your property supposed to clear it so you can keep your boat in there. Q. Did he have it cleared

away? A. He cleared away on the boat side. Q. What boats did he keep there? A. I don't remember; he had one schooner before, and he got another one after it. Q. You saw these schooners there? A.

Yes, I saw them. Q. Did he continue to keep these boats there until the time Chief Johnson died? A. He kept one schooner there all the time — black schooner, two masts on it. Q. Two-masted schooner and kept it there all the time? A. Yes, sir. Q. What use did Jacksons make of their property, that you know of—your grandmother? A. On the beach side? Q. Yes; the property that was just beyond Chief Johnson's property there. A. Yes; right next to

(Testimony of Tom Johnson.)

Chief Johnson's property. Q. On the other side of it? A. The lower side of it. Q. Did they make any use of their upland, or did they have a house up there? A. Yes; they had a house there. Q. Did they make any use of the beach? A. They used to have a canoe on the beach, too. Q. How long did your grandmother continue to live there? A. Well, I guess they moved at the same time as my family moved—of course, all in the one family, you see—and my mother tell me the way, you see—my mother and his mother moved there at the same time. Q. When did Mrs. Jackson move over there? A. As soon as the Treadwell Company bought it out, they moved away. Q. They lived there until the Alaska Juneau bought the property? A. Yes. Q. You don't remember how long ago that is? A. About two years ago. Q. Your grandmother lived there all the time? A. Yes; until two years ago, something like that. Mr. HELLENTHAL.—You may cross examine.

Cross-examination by Mr. RUSTGARD.

Q. You are 28 years old? [107—39] A. Yes, sir. Q. And your father died when you were 9 years old? A. Yes, sir. Q. At the time your father died you lived opposite where the fish-house now is? A. No; I mean at the time my father died I stayed there two years; after my father died, I moved to Douglas. Q. At the time your father died, where did you live? A. I lived in the house where my father died. Q. How far from the present fish-house? A. Right next to the fish-house. Q. Which side of

(Testimony of Tom Johnson.)

Chief Johnson's house were you? A. On the town side. Q. That house and Chief Johnson's house was right opposite from where the fish-house now is? A. Yes; right on the opposite side of it. Q. On the shore over there? A. Yes. Q. And you were on the town side of the Chief Johnson house? A. Yes, sir. Q. Now, you lived there two years after your father died? A. Yes, sir. Q. Your family moved away from there? A. Yes. Q. You had a small house at the time? A. Not very small. Q. But you tore it down a little afterwards? A. Yes; we tore it down—took it away. Q. How long afterwards? A. I don't remember; I was too young, you see. Q. You are pretty young yet? A. Maybe, my father—Q. Now, then you said you had a grandmother living there? A. What is that? Q. Did your grandmother, you say, live in the neighborhood? A. My grandmother was living on the other side of the Chief Johnson house. Q. That is down the channel from Chief Johnson's house? A. Yes. Q. What was her name? A. Her husband's name was Jackson. Q. Now, is your grandmother living now? A. Yes; she is still living now. Q. Where does she live? A. She lives in the other village on this side. Q. In the Auk Village in Juneau here? A. Yes, sir. Q. When did she move away from below town here? A. As soon as the Treadwell Company bought the land out she moved to Auk Village. The COURT.—By the Treadwell Company I understand he means the Alaska Juneau Company? Mr. HELLENTHAL.—Yes. Q. Do

(Testimony of Tom Johnson.)

you remember [108—40] Chief Johnson? A. Yes; I remember him. Q. How long since he died? A. He died when I was at school in Sitka. Q. How many years ago? A. 1904, something like that—1903; I don't remember it very well; I left Douglas for Sitka school in 1902, September 13th. Q. You went to Sitka in 1902? A. 1902. Q. You stayed how many years? A. Three years. Q. Was it during that time that Chief Johnson died? A. Yes; that time I was in Sitka Chief Johnson died. Q. About 1904 or '05, was it, he died? A. I think something like that.

[Testimony of Jimmie Johnson, for Plaintiff.]

JIMMIE JOHNSON, called as a witness on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. SIMON HELLEN-
THAL.

(Through Interpreter.) Q. What is your name? A. Jimmie Johnson. Q. Where do you live? A. I live at Douglas. Q. What is your business? A. He says he is not doing anything now, but in the summer time his business is fishing? Q. Did you ever live in Juneau? A. Used to live there a long time. Q. Whereabouts did you live? A. Used to stay with my father when he was living. Q. Whereabouts did you stay with your father? A. On this side of Chief Johnson's house. Q. Is that Chief Johnson's house on the upland right near where the fish-house now stands? A. The first

(Testimony of Jimmie Johnson.)

house he had? Q. The first house he had. A. Yes.

Q. Where was that with reference to the house known as the fish-house—was it near the fish-house?

A. Yes. Q. When did Tom Johnson's father first move there? A. The first time they come in here,

you see, the men discovered here; Chief Johnson and my father and Mr. Jackson and some other fellow, I don't know his name, they lived down there same place, and the fellow come around all the time

and he tell them they can move any place they want, pick up ground for themselves, so they moved down there; they took that place, Chief Johnson, my father and Mr. Jackson and the other fellow—I don't know his name, there were [109—41] four

of them took that place. Q. When was that—before or after Juneau was first struck, or was it at the same time Juneau was struck? A. It was one year

after they discovered Juneau. Q. Now, Tom Johnson's father is your brother, and is sometimes referred to as Chief Johnson's older brother, isn't he?

A. Yes. Q. How long did Chief Johnson's older brother continue to live there? A. Well, as long as

he took up that ground he lived there until he died; he had not been in a house any place else but that place. Q. Did his wife continue to live there? Mr.

RUSTGARD.—Whose wife are you talking about?

A. Chief Johnson's older brother's wife. A.

Where, down there? Q. Yes. A. After he died?

Q. Yes. A. Yes. Q. Did you live there at any time after that time? A. Yes, he says he lived

there about two years after Tom's father died, then

(Testimony of Jimmie Johnson.)

he moved to Douglas. Mr. RUSTGARD.—Whom do you mean by my father—is that the father of the witness? Mr. HELLENTHAL.—No; two years

after Tom's father died. Q. What did you do after you moved to Douglas with regard to that property?

A. Worked in Glory Hole after they moved to Douglas. Q. Did you do anything with your

property—after you moved, with this property just this side of Chief Johnson's house, after you moved to Douglas? A. Mrs. Jackson—Mr. Jackson and

his wife looked after it for him. Q. Who was this Mrs. Jackson—did she live near there? A. Yes; she lived there right close to Chief Johnson's house.

Q. Was it the other side of Chief Johnson's house?

A. On the other side. Q. How long did Mrs. Jackson live there? A. Mrs. Jackson and Mr. Jackson lived there until the Alaska Juneau bought it out.

Q. Who was Mrs. Jackson—was she any relation to you? A. Mrs. Jackson is my wife's mother. Q. Is

your wife the mother of Tom Johnson? A. Yes, sir.

Q. Now, when did Mrs. Jackson first move on that property? A. What property do you mean? Q.

On the other side of Chief Johnson. A. You mean when he moved on it first? Q. Yes. A. Well,

that is what he told me before; they lived down here as long as the fellow came along and told them to pick up [110—42] a piece of ground for them-

selves—that time they moved down there, they picked up the ground. Q. That was about a year

after Juneau was first struck? A. Yes; it was one year after Juneau was struck. Q. That was the

(Testimony of Jimmie Johnson.)

same time that Chief Johnson moved there? A.

Yes; they all moved there at the same time. Q.

Now, what use was made of the beach by Mrs. Jackson, and her people during the time that she lived there? A. They used to have canoes, and the

way the Indians used to do in olden times, they used to clear the beach so they can keep the canoes—a canoe is a pretty easy thing to crack if anybody leaves it on the rocks; they used to clear the beach away. Q. What use did Chief Johnson's older

brother make of the beach? A. He cleared his beach away from the place he used to have, and built a canoe shed on it, on the town side of the garden, on this side, and they cleared a space away so he could pull up his canoe there. Q. He said he had a canoe shed on it the side towards town from the garden?

A. The canoe shed was on the town side. Q. What use did he make of the beach during the two years that he lived there—what did he do with the beach during the two years? A. You see, before he move

over to Douglas he had some posts on that property—that is all he had there. Q. Whereabouts did you

put those posts? A. Put a post just right from the canoe shed and the other corner of the house, where he put the posts. Q. What did Chief Johnson do with

the beach in front of his house? A. He say he used to clear his beach, too, so he could keep his schooners there—he had two schooners; after he died one laid on this side of the sawmill, and it laid there until the tide drifted it away over there. Q. He says one continued to lay there until after he died? A. Yes.

(Testimony of Jimmie Johnson.)

Q. And stayed there until after he died, and then the tide drifted it away? A. Yes.

[Testimony of Mrs. Fannie Johnson, for Plaintiff.]

Mrs. FANNIE JOHNSON, a witness called on behalf of the Alaska [111—43] Juneau Gold Mining Company, being first duly sworn, testified as follows;

Direct Examination by Mr. SIMON HELLEN-
THAL

(Through Interpreter.) Q. What is is your name? A. Fannie Johnson. Q. Are you the wife of Jim Johnson? A. Yes. Q. And before you lived with Jim Johnson, you were the wife of Chief Johnson's oldest brother? A. Yes. Q. Are you the daughter of Mrs. Jackson? A. Yes. Q. Where are you living now? A. Douglas. Q. Have you ever lived in Juneau? A. The first time we used to live in Juneau. Q. When did you first come to live in Juneau? A. One year after they struck Juneau. Q. Where did you live in Juneau at that time? A. That is the place right there, below the sawmill. Q. Do you know where the fish-house is? A. Yes; she know. Q. Do you know where the place is they call Chief Johnson's first house, just upland from the fish-house? A. She knows. Q. The place you live there, was that near Chief Johnson's first house? A. She used to live on the town side of Chief Johnson's house. Q. Do you know when Chief Johnson first moved to the place called Chief Johnson's first house? A. Yes; she know. Q. Was that before or after they moved to the place that she just said they moved to? A. What do you mean, Chief Johnson?

(Testimony of Mrs. Fannie Johnson.)

Q. Yes; did Chief Johnson move there at the same time? A. One year after they moved there, Chief Johnson moved in too. Q. One year after Juneau was discovered? A. Yes. Q. Who lived on the other side of Chief Johnson's? A. My mother. Q. Mrs. Jackson? A. Yes. Q. When did she move there? A. Same time they moved. Q. How long did Mrs. Jackson continue to live there? A. She say her mother lived there until the Alaska Juneau bought the ground. Q. Now, ask her if I understand correctly—she says that Chief Johnson, she, and Jackson all moved there at the same time? A. She said they moved at the same time. Q. How long was that after Juneau was discovered? A. One year after Juneau was discovered. Q. One year after the camp was struck? [112—44] A. Yes. Q. What did they do, did they build any houses on their ground at the time they moved there? A. They put up the house and she put a little garden in the front. Q. How long did she live there? A. She lived there until her husband died, my father. Q. How long did you live there after your first husband died? A. Two years ago moved to Douglas. Q. What did you do with the property after you moved away? A. Says the ground was there and the canoe shed was there—used to have a shed to keep the canoe in. Q. A canoe shed was there? A. Yes, sir. Q. What use did you make of the beach during the time you lived there? A. Said they used to clear the beach away so the canoe would not crack—if anything drifted on the beach they used to clear it up. Q.

(Testimony of Mrs. Fannie Johnson.)

What use did Chief Johnson make of the beach?

A. Says Chief Johnson cleared the beach, too, so he could keep his schooners there. Q. Did Chief Johnson

keep his schooners there? A. Yes; he keep the

schooners there. Q. What use did Jackson make of the beach—what did they do with the beach? A.

They used to—Jackson cleared his beach away too—they used to have a big canoe, too.

Cross-examination by Mr. RUSTGARD.

Q. When did you say you moved away from that place? A. From where? Q. What time did you

move away from that place down on the beach? A.

Down here you mean, the other place? Q. Yes; this

place she talks about in her testimony, near the old

Chief Johnson house. A. The time she moved? Q.

Moved away from there. A. Two years after her

husband died she moved to Douglas. Q. Her first

husband died 19 years ago? A. Yes. Q. And two

years after that she left this place? A. To Douglas.

Q. Went over to Douglas? A. Yes. Q. And you

have been living there since? A. She says my

mother live there and come over once in a while to

see his mother. Q. What time did you tear down

the house? A. She says the wind took it down, and

took it apart—the wind blew it [113—45] down

first, and they took it apart. Q. The wind blew

down the house first and then you took it away?

A. Yes, sir. Q. How long was that after you moved

away from there? A. She thinks it is about five

years after we moved to Douglas. Q. Now your

mother lived on the other side of Chief Johnson's

(Testimony of Mrs. Fannie Johnson.)

house, didn't she? A. Yes. Q. Further down the channel? A. Yes. Q. Where did you come from when you came to Juneau? A. She said they lived around here all the time. Q. Where were you born? A. You know that village right out there (indicating)? Q. You mean down at Point Bishop? A. On this side of Point Bishop. Q. At Taku Inlet? A. Yes; that is where she was born. Q. What is the name of that village? A. I don't know. Q. Don't know the English name of it? A. Don't know the English name of it. Q. That is where Chief Johnson came from, too, isn't it? A. Yes; same place. Q. Chief Johnson and your mother and father had a house down there at Taku when you moved up here, didn't you? A. No; they have got no house. Q. Did they have one at the time they came to Juneau first? A. They come in here before she is married to my father. Q. Where did your first husband come from? Come from Taku. Q. Did he have a house down there at the time he moved up to Juneau? A. Which place do you mean, down there? Q. Yes. A. There was no house there then when they moved there. Q. Were there any houses at Taku when they came to Juneau? A. Oh, you mean Taku? Q. Sure, I am asking if there were any houses at the village in Taku at the time these people moved to Juneau. A. The houses you see—the houses there—is where they used to live, the Taku Indians. Q. The houses are there yet? A. Yes. Q. After you moved up to Juneau did you go sometimes and live at the Taku Inlet house—the Taku Village houses?

(Testimony of Mrs. Fannie Johnson.)

A. Said they don't go back there any more—they stayed here for work, so they can work here. Q. Did you never go down to the Taku Village after you came to Juneau first? A. She [114—46] never go back. Q. Never been there since? A. Yes. Q. Have you never been to the Taku Village since you left there and came to Juneau first? A. Used to go up to Taku past that village—that is all she knows. Q. Past it? A. Past Taku and get some fish up there. Q. How far is it from Juneau to that old village at Taku Inlet? A. She don't know how many miles.

Plaintiff then introduced in evidence: Location notices of A copy (attached exhibit "T"), L. & G. millsites; Deeds to plaintiff for A. (copy attached Ex. "V") L. & G. Millsites from the locators thereof.

Mr. HELLENTHAL.—I now offer deeds from Jimmie Bean, as an individual, and as chief of the Taku Tribe of natives, to the Alaska Juneau Gold Mining Company for a piece of upland therein described. Mr. RUSTGARD.—I object to that as immaterial, irrelevant and incompetent, and there being no evidence that Jimmie Bean, either as an individual or as Chief of the Taku Tribe, was seized or possessed of any land involved in this controversy. The COURT.—The objection will be overruled. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "X.") (This exhibit purports to convey what is delineated on exhibit "Y" as Lot B, and copy of which is hereto attached.)

[Testimony of P. R. Bradley, for Plaintiff.]

P. R. BRADLEY, a witness called on behalf of the Alaska Juneau Gold Mining Company, being duly sworn, testified as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. Your name is P. R. Bradley? A. Yes, sir. Q. You are the general superintendent of the Alaska Juneau Gold Mining Company? A. Yes, sir. Q. You are familiar with the operations of the company? A. Yes, sir. Q. And have been familiar with its operations for some time past? A. I have. Q. You are familiar with the property in controversy in this case? A. Yes, sir. Q. You know where the fish-house is? A. Yes. Q. And the tract of land immediately this side of the fish-house? A. Yes. [115—47] Q. You are familiar with what is known as the Jorgenson Mill? A. Yes. Q. You know where the townsite of Juneau is? A. Yes, sir. Q. And where the Abe Lincoln and General Grant Lode Claims are located? A. Yes. Q. Also where the Jorgenson sawmill log boom is? A. Yes. Q. And the Alaska Juneau wharf and other structures in that vicinity? A. Yes. Q. I direct your attention now, Mr. Bradley, to exhibit No. 1, and ask you if you can take a scale and place on that the Jorgenson thousand-foot reservation that has been referred to, and that is described in the deed which has been offered in evidence, showing where it would come to? The COURT.—Well, now, Mr. Hellenthal, there is a scale on the map and I can do that myself, I don't need Mr. Bradley to do that, I can measure

(Testimony of P. R. Bradley.)

it myself. Mr. HELLENTHAL.—I know you can, Judge, but there might be some difficulty in getting it measured right, and an engineer can get it measured more accurately and quicker than one who is not an engineer. A. The position of the thousand feet would be measured 20 inches from a point 555 feet south of corner No. 4 marked on the map. Q. That is, 555 feet to the commencement of it and—A. Twenty inches from that point would scale a thousand feet. Q. I wish you would just mark there—draw a line at the point where the thousand feet would commence, 555 feet from the corner—now draw a line across. (Witness draws a line in red pencil.) Q. Mark it with the letter A. (Witness does so.) Q. The red line marked with the letter A is the northernmost end of the thousand-foot reservation as described in the deed? A. Yes, sir. Q. Now, mark the most southern end of the reservation with a red line and mark that with the letter B. (Witness does so.) Q. Are you familiar with the piece of ground lying between the southernmost end of the red line—that is to say—the southernmost end of the Jorgenson reservation indicated by the red line marked with the letter B, and the fish-house, shown on exhibit 1? [116—48] A. Yes. Q. I wish you would tell the Court what, if anything, you expect to do with that ground? A. That ground was planned to be used in connection with the future operations of the Alaska Juneau Gold Mining Company. As soon as the construction work starts on the new program, it is proposed to erect a mill of

(Testimony of P. R. Bradley.)

8,000 tons day capacity. Q. That is the unit that will be immediately constructed? A. Yes; the construction of a mill of such capacity. Mr. RUSTGARD.—I think I will object to that as immaterial and irrelevant, and as having no bearing on the right of possession of the property below the street. The COURT.—Is this question directed to what he is going to do with the upland? Mr. HELLENTHAL. Yes. The COURT.—Objection overruled. Q. The Alaska Juneau Gold Mining Company has a mine in Silver Bow Basin? A. Yes. Q. About how large a mine is that—about how many claims? A. There is a group of 90 claims, approximately 90 claims, more or less. Q. What is the character of the ores, just in a general way, Mr. Bradley. A. The ore body is technically described as a slate formation; in other words, it is a mass of slate impregnated with quartz stringers through it for about 900 feet. Q. The width of it is approximately 900 feet? A. Yes. Q. And what is its character with reference to being high or low grade? A. It is low grade. Q. Such that it has to be worked on a very large scale in order to make it profitable? A. Yes. Q. How much money has been expended in connection with new development work irrespective of the mine value—the work that has been done there from 1910—in 1910 you commenced the surface work in connection with your new development work, did you not? A. Yes. Q. How much money have you expended in that development? A. One million, eighty thousand dollars. Q. That is besides the property

(Testimony of P. R. Bradley.)

you have acquired? A. Yes. Q. Now, Mr. Bradley, you know where the A millsite, and all this group of millsites of the Alaska Juneau are, situated near Gastineau Channel? A. Yes. [117—49] Q.

What are they to be used for, in connection with what property? A. They are to be used for the purposes

of building mills and also for the purpose of building all other structures necessary for the milling and refining of the ore. Q. The milling plant which is to be used in connection with the mines in Silver Bow Basin is to be constructed on those millsites?

A. Yes. Q. The A and L millsites form part of a group of millsites? A. Yes. Q. And cover the

same ground, practically, that the Abe Lincoln and General Grant cover, and also are covered in part by some Indian titles which you purchased? A.

Yes. Q. What have you done up to date in the way of mill construction on these millsites? A. Up to

date we have constructed a fifty-stamp mill, which is considered a pilot mill for the investigation of milling operations in general to guide us in the construction of our future plants. Q. What have you done

in the way of connecting the mine with the millsite? A. We have connected the mine with the millsite by

a tramway approximately 10,000 feet long, which consists in part of trestles and in part of tunnel work. Q. And the cost of this tramway and the

work you have done on the millsite is in excess of a million dollars? A. Yes. Q. You have built some

other structures on the millsite besides the mill? A. Yes. Q. What are they in a general way? A.

(Testimony of P. R. Bradley.)

We have built an office, carpenter shop, warehouse, heating plant, dormitories, storehouse, gravel bunkers, and various other mill buildings. Q. I direct your attention to a map that purports to be a map of the Abe Lincoln and General Grant claims, and also has a large number of other things on it, and ask you to look at that and state if you are familiar with it? A. Yes; I am familiar with the property embraced in this map. Q. Does that map properly show the things delineated [118—50] upon it? A. To the best of my knowledge and belief. Q. You are familiar with the things, shown thereon, in a general way? A. Yes. Mr. HELLENTHAL.—I offer it in evidence. Mr. RUSTGARD.—I would like to ask a few questions before it is put in evidence. Mr. HELLENTHAL.—No objection. Questions by Mr. RUSTGARD. Q. The present mill is not shown here, is it? A. No; the present mill isn't shown here. Q. This oil tank, is it on the ground? A. No; that is an oil-tank site. Q. Is this place called "Turbo Electric Power Plant" on the ground? A. The Turbo Electric Power Plant is not there. Q. Nor is the oil tank? A. No. Q. You didn't make this map yourself? A. No; I believe that map was made by Mr. Stewart. Q. This map doesn't show the houses situated across the street from the sawmill, nor along up the side of the street? A. No. Mr. RUSTGARD.—I object to the competency of this map under the circumstances. Questions by Mr. RUSTGARD.—Q. What does this 19 represent close to the fish-house? A. I don't

(Testimony of P. R. Bradley.)

know what that represents. Q. What is meant by these places off from the beach marked "Mill, Mill, Mill"?

A. Under the original program those were sites located for three individual units. Q. They

are not built yet? A. No, they are not built. Q.

They represent that you may build on them? A.

That we propose to build on them. Q. Now, these

letters A and B, what are they? (No answer to last

question.) Mr. RUSTGARD.—I object to the evi-

dence as incompetent. The COURT.—Well, it just

depends, of course, what it is offered to show; if it

is offered to show what they propose to do—where

they propose to put these things, I think it would

be admissible; if it is offered to show the condition

of things it would not be admissible. What do you

offer it for, Mr. Hellenthal? Mr. HELLENTHAL.

—Simply to show where these things are [119—51]

to be placed; it shows the ground and marks the

place where these particular improvements are to be

placed, so the Court can understand it. The

COURT.—Very well; with that understanding I will

overrule the objection. (Whereupon said map was

received in evidence and marked Alaska Juneau

Company's Exhibit "Y," and is hereto attached.)

Q. Now, I direct your attention to exhibit "Y," and

ask you to step up here to the blackboard and ex-

plain that whole map to the Court, the various things

that are shown upon it, commencing now, for in-

stance,—the sawmill shown here is on the ground

now? A. Yes. Q. The street there, called the

Government Road, that is on the ground now? A.

(Testimony of P. R. Bradley.)

Called the City Road—that is on the ground. Q. Running from the sawmill to the Alaska Juneau wharf? A. Yes. Q. The Alaska Juneau wharf, is that shown there—is it marked the Alaska Juneau wharf? A. The Alaska Juneau wharf is here, but it is not marked Alaska Juneau Wharf; it is marked warehouse—it is at the point marked warehouse. Q. Warehouse on the extreme right of the map? A. Yes. Q. Now, going from that to the left, what is the next thing shown here? A. The next thing shown is the salt water pump; it is a pump placed on the float in order to pump salt water to the mill when the fresh water fails in the winter season. Q. Is that marked there? A. It is marked “Salt Water Pump.” Q. What is the next thing shown? A. The next thing shown that is on the ground is the railroad tract running from the wharf up to a point near the float. Q. Is the float shown? A. The float is shown. Q. It is marked float? A. Marked float. Q. What else is shown in that vicinity? A. The railroad track is continued across here as it is on the ground, and back in this direction as it is on the ground. Q. Back towards the wharf? A. Back towards the wharf. Q. All those things you have testified to are on the ground? A. Yes. Q. The warehouse on the wharf, is that on the ground? [120—52] A. Yes. Q. And the float is on the ground? A. Yes. Q. The tramway up the hill there? A. This tramway up the hill is on the ground. Q. Is that marked there? A. It is marked “Incline Tramway.” Q. That has been constructed

(Testimony of P. R. Bradley.)

and is on the ground? A. Yes. Q. What is next?

A. The next thing that is marked is the Alaska Juneau stable; that has been burned down. The next thing marked is the warehouse; that is on the ground. The next thing shown is the gridiron, but it is not marked as such. Q. Mark it gridiron, please.

(Witness does so.) Q. Now, what is the next thing shown? A. The next thing that is shown as on the

ground is a dwelling house on Lot No. 2. Q. There are a great many buildings on the ground in that vicinity that are not on the map? A. Not shown

at all. Q. Many improvements you have placed

there? A. Yes. Q. Now, coming to the place marked "Turbo Electric Power Plant," is that on

the ground? A. The Turbo Electric Power plant

is not on the ground. Q. And the oil tank, is that on

the ground? A. It is not on the ground. Q. Why?

A. The Turbo Electric Power plant is the site selected to build a power plant to supply the Alaska Juneau mill operations. The oil tank location was located at this point to construct a tank containing 30,000 gallons of fuel oil to be consumed in that power plant; in connection with the Alaska Treadwell operations, it was decided last summer to build an additional power plant, and it became quite evident that the most economical thing to do was to install this machinery which was already purchased and lying on the ground, in the same house on Douglas Island with the additional power plant of the Alaska Juneau, to be operated by the same operators, in the same power plant, thereby saving money

(Testimony of P. R. Bradley.)

for both concerns. Q. That is a temporary arrangement made last fall? A. Yes. Q. Where is the site for the permanent power plant? A. This power plant site is still available. Q. What was done in the way of grading or improving this ground? A. there [121—53] was a great deal of filling-in of the low ground and a great deal of excavating on the high ground. Q. You have worked over all of that ground in that vicinity? A. Yes. Q. And you have placed some structures on the ground that has been filled in in that neighborhood? A. Yes. Q. Now, about the coal-bunkers, where do you expect to put the coal-bunkers? A. The coal-bunkers would have to be placed immediately in front of the power plant; they could be placed elsewhere, but the transportation of the coal would make any other scheme most costly; the logical place to put the bunkers is as near the power plant as we can get them. Q. Is the lower end of the Jorgenson reservation shown on this map? A. It is shown in green. Q. Now, what use do you intend to make of the ground lying between the lower end of the Jorgenson reservation and the fish-house—what use do you want to make of it, in the first place, in connection with the power plant? A. We will establish a wharf there for the receiving of coal, and on this wharf would be built coal-bunkers. In connection with a milling plant of the magnitude of 8,000 tons a day capacity there is a tremendous amount of material to be handled—iron work, steel work and machinery of all kinds must be gathered together and assembled

(Testimony of P. R. Bradley.)

so it can be handled in proper order and proper sequence. The yarding of such material requires a considerable area which must be perfectly level to facilitate the handling and assembling of the various equipment and structural materials to be used. Q.

You intend to build a wharf covering that area, to be used in that connection, in the immediate future?

A. Yes. Q. Where is the unit of 8,000 tons—the 8,000 ton unit to be built? A. Approximately on the

most westerly site marked “Mill.” Q. Instead of building three units at the present time, there will be one unit of 8,000 tons capacity to be constructed at once? A. Yes. Q. And other units to be added

later on? A. Yes. Q. And it is in connection with the construction of that mill that you intend to land

the material on the [122—54] wharf of which you have just testified? A. Yes. Q. Is there any other

available space for that purpose? A. There is a small amount of space between the two points marked

warehouse, but we have not considered that, because it alone is not sufficient. Q. It alone would not be

sufficient? A. Yes. Q. What, if anything, has the Alaska Juneau Company done in the way of raising

money to carry on this construction work about which you have just testified—how much have they

raised, if anything? A. They have raised 4,000,000 dollars. Q. \$4,000,000 for that purpose? A. Yes.

Q. I think you have already stated that as soon as you can get around to it you intend building a wharf

to cover that area, to be used in that connection? A. Yes. Q. Do you know Mr. Robert A. Kinzie? A. I

(Testimony of P. R. Bradley.)

do. Q. Do you know Mr. F. W. Bradley? A. I do.

Q. Do you know Mr. John H. McKenzie? A. I do.

Q. Where are these gentlemen now? A. Mr. F. W. Bradley and Mr. J. H. McKenzie are in San Francisco, California; Mr. Robert A. Kinzie, to the best of my knowledge and belief, is also in San Francisco.

Q. None of these gentlemen is in the Territory of Alaska? A. I know that Mr. Bradley and Mr. McKenzie are in San Francisco.

Q. If Mr. Kinzie was in Alaska you would be quite sure to know it, wouldn't you, Mr. Bradley? A. I think I would be *quite to* know of it.

Q. To the best of your knowledge he is in San Francisco? A. Yes.

Q. Do you know anything about these Indian lots, where they lie—do you know where the Jackson, Johnson and Bean lots are, where they lie? A. I can refer to this memorandum.

Q. Where is the Jimmy Bean lot located on this map, Mr. Bradley—how is it indicated on this map? Mr. RUSTGARD.—I shall object to that specifically because it seems to me the most competent evidence would be that of the surveyor.

Mr. HELLENTHAL.—That is probably true, Mr. Rustgard, but they are indicated on the map and Mr. Bradley can show which they are.

The COURT.—Of course, anybody would be competent to testify to it that knows it; if he knows he can testify, if he don't he can say so.

A. The Jimmie Bean lot is marked here as lot B.

Q. Lot B on the map is the Jimmie Bean lot.

A. Yes.

Q. Now, how is the Johnson lot indicated? A. That is the lot marked lot 1 on the map.

Q. That is [123—55]

(Testimony of P. R. Bradley.)

one of the Johnson lots; now, how is the Chief Johnson indicated? A. I cannot say which is the Chief Johnson lot. Q. There are two Johnson lots, aren't there? A. I cannot say that there are two Johnson lots. Q. Do you know what lot No. 2 is, Mr. Bradley? A. That is the fish-house lot. Q. Do you know what lot No. 3 is—have you got that marked there? A. John Jackson. Q. Here, Mr. Bradley, is a deed from Jimmy Bean—look at that description in that deed and see if that tallies with the lot marked on the plat as lot B? Mr. RUSTGARD.—I object to that as not the best evidence and as calling for a conclusion; the deed speaks for itself and so does the map. The COURT.—I think the objection that the witness has not been qualified will be sustained. Q. You are a surveyor, aren't you, Mr. Bradley? A. Yes. Q. You are able to check that description and plat it on this map, are you? A. Yes. Q. And you are able to tell whether that description tallies with lot B, as indicated on the map, aren't you? A. From a surveyor's point of view, no; because there are no bearings given on this map. Q. What do you need to check that? A. I would need a north point. Q. Is there no north point given there? A. Or any angle at all. Mr. HELLENTHAL.—The reason I am doing this is because Mr. Stewart is not here, and I wanted to facilitate the matter, is all. The COURT.—I know, and you would be permitted to do it if no objection had been made. Mr. RUSTGARD.—I will say, if it is only for the purpose of identifying the description

(Testimony of P. R. Bradley.)

in the deed, I will waive all objections, because it is simply a matter of facilitating the whole evidence; but if it is for the purpose of proving up on these Indian titles, of course, I will object to it. The COURT.—Very well; under that statement you may proceed. Q. State whether or not the property described in that deed is the same as the plot indicated on exhibit “Y” as lot B? A. This will take some time. Q. Then we will skip it over and call some other witness while you do it. Will you take your pencil and mark in a rough outline on this map the point where the wharf is to be built which you intend to use for unloading this construction material, and which you intend to use for the other purposes to which you have testified, in red pencil, [124—56] and write the words “Proposed Wharf” on there. A. The depth of the wharf will be determined, of course, by the depth of the water. Mr. HELLENTHAL.—You may cross-examine.

Cross-examination by Mr. RUSTGARD.

Q. What time did you come to this part of the country? A. A year ago last month. Q. Hadn't been in Alaska before? A. No, The COURT.—I think we will suspend for ten minutes. Mr. HELLENTHAL.—Mr. Bradley has been checking up these Indian lots, and I will ask him about them. Q. Did you check up that Bean lot on the map? A. The lots marked A and B check up in accordance with the description given in the deed. Q. The deed covers both lots A and B? A. Yes, sir. Q. The two lots then, A and B, as indicated on the map, exhibit

(Testimony of P. R. Bradley.)

“Y,” are both included in the Bean deed? A. As per the description in the deed. Q. Did you check up the other lots, 1 and 2? A. No. Q. The description in the deed marked exhibit “Y” embraces both lots A and B as platted on exhibit “Y”? A. Yes, sir. Mr. HELLENTHAL.—That’s all.

Cross-examination by Mr. RUSTGARD.

Q. Now, Mr. Bradley, you don’t [125—57] know anything about those Indians who gave those deeds yourself? A. No; I had no personal dealings with them. Q. You don’t know whether they ever lived there or not? A. No. Q. You don’t wish to testify that they owned the property and had a right to convey it? A. No; I don’t know that of my own knowledge. Q. All you mean to testify to is that those marks on that plat, exhibit “Y,”—that those lines delineated on the map correspond with the description in these deeds? A. Yes, sir. Q. And that is all you mean to testify to? A. Yes. Q. Now, regarding those improvements on the ground, the place designated “Oil Tank” you have already explained is not on the ground? A. No; the oil tank is not on the ground; there has been some grading done at that point. Q. Do you expect to put an oil tank there now? A. Oh, I expect in the course of our future operations we will be compelled to put an oil tank there. Q. When did you conceive of putting the oil tank there? A. That was conceived in the original program; it was planned before I came upon the ground; the oil tank was bought, purchased and placed at that point. Q. That site is a considerable

(Testimony of P. R. Bradley.)

distance above your flume line carrying the debris from the mine? A. No, below. Q. Runs through and over it—that site is over where your tailing flume now runs? A. Yes. Q. And you mean to say that you have done any grading at that point? A. Yes; at the time the material was placed down there we started grading; I think there was \$150.00 charged out for grading the oil site. Q. One hundred and fifty dollars? A. Yes; that is my impression. Q. How long has that been? A. That was prior to my arrival here, a year ago last March. Q. That was prior to the time when the preliminary hearing was had in this case, was it? A. It must have been, because that was before I arrived. Q. The same is true of the place called “Turbo Electric Power Plant”—no grading had been done there, had there? A. At what time? Q. At this time? A. Oh, yes. Q. Where? A. There has been over \$1,000.00 expended in [126—58] grading at that point. Q. Whereabouts? A. Chiefly at the back, because that is where the high bank is. Q. When was that expended? A. Oh, I should say last June. Q. You turned the water on there? A. We turned the water on, and put men on with wheelbarrows taking the bank down. Q. You talked about a number of other improvements, buildings—You had reference, did you, to improvements up in Gold Creek basin? A. No. Q. Well, what other improvements did you have on this particular ground except those that you have particularly pointed out? A. In addition to the warehouse we have built on the wharf a derrick

(Testimony of P. R. Bradley.)

with the necessary electric hoist which is housed in with a small house; at about this point (indicating) we constructed an office building. Q. Describe that point so that we can get it into the record. A. I should say that point is between the shore line and the Government Road and to the east of a line drawn through the east side of the warehouse. Q. How much of an office building is that? A. That was an office building quite sufficient to meet all the office work that was done during the first year of construction work. Q. You fixed up an old cabin standing there, that is a fact, isn't it, worth about four or five hundred dollars? A. The office building? Q. Yes. A. I think something like that. Q. How much waterfront does your company claim— Q. Now, Mr. Bradley, from your wharf, marked "Warehouse," in a southeasterly direction how long a stretch of waterfront along the Gastineau Channel does your company claim? A. I couldn't say offhand, but a considerable extent. Q. How much approximately? A. Oh, I should say at least 2,000 feet. [127—59] Q. Two thousand feet? A. Yes. Q. Now, from your wharf to Sheep Creek is a distance of a little over three and a half miles? A. About that. Q. Don't you claim at least half of the waterfront in that direction? A. Oh, I believe not. Q. You have a large number of millsites and mining claims located between your wharf and Sheep Creek? A. We have some millsites and some mining claims. Q. Can you state how many? A. Offhand, no. Q. Can you state approximately how many? A. Oh, I

(Testimony of P. R. Bradley.)

should say the number of mining claims plus the millsites does not exceed ten. Q. That is exclusive of the millsites you are now applying for patent for?

A. No; some of those are included in the patent applications. Q. Some of those ten? A. Yes. Q.

How many millsites are you applying for patent to on this waterfront? A. I cannot give you the exact

number offhand. Q. They number pretty close to ten, don't they? You recognize these two plats? A.

I believe the territory you had in mind when you asked the question is from this point (indicating)

southeast. Q. That is correct. A. In other words, from this point in this direction? Q. You are now

applying for patent to about ten millsites, aren't you? A. I couldn't say. Q. Lying over the ground

marked here Abe Lincoln and General Grant? A. There are eight millsites on the plat, but I cannot

say that those are all included in patent applications.

[128—60] Q. You are applying for patent for millsites designated B, E, C, L, A, G, T, F, B, H and P, are you not? A. Yes, sir. Q. Now, aside from

those you said you have about 2,000 feet, more or less, of waterfront on Gastineau Channel immediately southeasterly from your fish-house—from your warehouse? A. That is my impression; yes, sir. Q.

And in round numbers, as near as you can state, now, representing ten millsites and mining claims together? A. Something like that. Q. What is your

reason for not wanting to extend the wharf southeasterly from your present wharfsite? A. Because

that would be in the path of snowslides. Q. Isn't it

(Testimony of P. R. Bradley.)

a fact you contemplate in the immediate future to extend your wharf in that direction? A. We do not.

Q. That has never been contemplated? A. No. Q.

You are afraid of snowslides? A. Yes. Q. How

much of a stretch of country there do you fear snowslides on? A. Well, I should say offhand about 75

per cent of it. Q. About 75 per cent of it—is it one continuous stretch of country? A. No; those spots

which are free from the dangerous snowslides are very small; there is considerable area in that section

which is free from snowslides, but there is no great stretch at any one point which is free from snow-

slides. Q. Now, how far does this track extend—evidently intended here to represent a railroad track

or tram—along the beach running in a southeasterly direction from your warehouse? A. Oh, I should

say not less than 300 feet. Q. What is the objective

point? A. The powder-house. Q. Is it down in that neighborhood some place that Shattuck has his

powder-house, too? A. Yes. Q. How far from

your place? A. Well, it is perhaps 100 or 200 feet further on. Q. And up on the hillside about where

those slides come from you have got a plant, called a tailing plant? A. We have a tailing plant on the

hillside, but not where the slides come from. Q.

Start higher up or lower down? A. They come further down. Q. Right over the office? A. The office

is in a dangerous position, that is why it was abandoned. Q. When was it abandoned? A. It was

abandoned this spring [129—61] or early summer. Q. The danger from snowslides is chiefly in

(Testimony of P. R. Bradley.)

the summer season, is it—you weren't afraid of them last fall? A. We got out of there as soon as it was convenient. Q. Do you yet contemplate putting in a Turbo Electric plant? A. Yes; we contemplate putting in an additional power plant with the Alaska Juneau equipment. Q. Is that where you expect to put it (indicating on the map)? A. Yes. Q. Turbo electric? A. Yes. Q. When do you expect to start in with that? A. I cannot say at the present moment because I haven't received the full instructions from San Francisco in regard to the program for the work to be carried out this summer. Q. Now, as a matter of fact, you expect to get power for that mine from Speel River, don't you? A. No. Q. Well, the Alaska Juneau claims an interest in the project at Speel River, don't they? A. I believe they claim a one-quarter interest. Q. Is it the intention of your company to utilize that power for the mines here? A. No. Q. What do they expect to use it for? A. I think they have no expectation of using it for any purpose. Q. They haven't abandoned it? A. No. Q. By Speel River, of course, I mean the power from it which is got on Long Lake, Crater Lake, Speel River and Tease Lake—they don't expect to use any of this power for operating the mines or mills or any part of the plant here at Juneau? A. No. Q. Never did intend to? A. They did intend to at one time. Q. When did they abandon it? The COURT.—Now, Mr. Rustgard, I don't want to inquire into anything that is not connected with this case. Mr. RUSTGARD.—That question was objected to

(Testimony of P. R. Bradley.)

was it? The COURT.—I objected to it myself. Q. I want to show you this plat, called “Section F of Mineral Survey No. 982—A and B” and want to ask you if that is a section of a plat filed by your company in the land office in connection with your application for patent for those millsites shown? A. I believe that to be the case. Q. You are at present advertising in that case? A. Yes. Q. The application is pending? (No answer to the last question). Mr. RUSTGARD.—You will admit that to be a duplicate of it? Mr. HELLENTHAL.—Yes. [130—62] Mr. RUSTGARD.—I offer this map in evidence in connection with this cross-examination. The COURT.—Very well, it will be received. (Whereupon said map was received in evidence and marked Worthen Lumber Company’s Exhibit No. 7 and hereto attached.)

Redirect Examination by Mr. JACK HELLENTHAL.

Q. Mr. Bradley, in a general way, all the ground claimed by you on the Gastineau Channel shown there is necessary for use in connection with your milling plant? A. Yes, sir; it is. Q. By way of illustration, Mr. Bradley, how does the area used here by you and occupied here by you compare with the area occupied by the Treadwell mines? Mr. RUSTGARD.—That comes under the same objection. Q. How does the area occupied by the Alaska Juneau Company here compare with the area of other plants of the same magnitude? A. I believe the available or usable area within the boundaries

(Testimony of P. R. Bradley.)

claimed would be smaller. Q. Smaller than what?

A. Than plants handling a tonnage of what we proposed to handle, namely, 8,000 tons per day. Q. Are

there any other plants of that magnitude—of that size—plants as large in operation now? A. No gold

mining plant in the United States has a capacity of 8,000 tons per day. Q. What is the capacity of the

Treadwell plant? A. About 4,500 tons a day. Q.

That is one of the largest gold mining plants in existence at the present time? A. Yes. Q. That is the

same kind of a plant, isn't it, in a general way, Mr. Bradley? A. Yes. Q. In a general way, the same

methods are employed? A. Yes, sir; with the exception of the fact that we are hoisting over there

and will not be hoisting over here. Q. I know, but the milling operations are practically the same? A.

Yes. Q. Now, how does the area occupied by the Treadwell plant, taking the Treadwell plant as a

whole, compare with the area occupied by the Alaska Juneau Company? A. It is much greater. Q. And

the entire area that the Treadwell is occupying, is it necessary? A. It is, absolutely. Q. Will it take

you very long, Mr. Bradley, to see if these other two deeds are correctly platted on that map? A. No, I

believe not. Q. Here is a deed from Jimmie Johnson, Thomas Johnson and Louis Johnson, [131—63]

to the Alaska Juneau Company— Mr. RUSTGARD.—I object to that as immaterial, irrelevant

and incompetent. The COURT.—I suppose this is for the same purpose you had him check the other

deeds. Mr. HELLENTHAL.—Yes, your Honor, I

(Testimony of P. R. Bradley.)

offer that in evidence. The COURT.—Objection overruled. Mr. RUSTGARD.—Same objection as I made to the other Indian deeds—there is nothing shown that they had any property to convey. The COURT.—Objection overruled. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "Z.") (This exhibit is a deed signed by Jimmie Johnson, Thomas Johnson and Louis A. Johnson to Alaska-Juneau Gold Mining Co. and purports to convey what is designated on exhibit "Y" as lot 1, and a copy of which is hereto attached.) Mr. HELLENTHAL.—I now offer in evidence deed from John Jackson to the Alaska Juneau Gold Mining Company. Mr. RUSTGARD.—I make the same objection to this. The COURT.—The same ruling. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "A-1," copy attached.) (This exhibit is a deed from John Jackson to plaintiff and purports to convey what is designated on exhibit "Y" as lot 3.) Mr. HELLENTHAL.—I offer also a deed, your Honor, from Peder O. Holsboe, Nels Pearson and Knudt Topness to the Alaska Juneau Gold Mining Company. Mr. RUSTGARD.—I object to that for the reason it is *now* shown that they had any land, premises or property to convey and therefore hte deed conveys nothing. The COURT.—Objection overruled. Mr RUSTGARD.—And gives the Alaska Juneau Company no rights. The COURT.—Objection overruled. (Whereupon said deed was received in evidence and marked Alaska

(Testimony of P. R. Bradley.)

Juneau Company's Exhibit "B-1.") (This exhibit is a deed from Peder O. Holsboe, Nels Pearson and Knudt Topness to plaintiff and purports to convey what is designated on exhibit "Y" as lot 2, dated after this action was commenced.) [132—64] Q. Mr. Bradley, will you take this patent map (Exhibit No. 7), step up to the blackboard and tell us whether those millsites are properly platted on the map, exhibit "Y." Are the millsites shown on exhibit "Y," referring to the A, L, E, T, B, G, U and Z millsites correctly platted on the map, exhibit "Y"? A. To the best of my knowledge and belief, the measurements and the physical features on the property check with the lines as laid out on the map. Q. As described in the patent map? A. Yes. Q. In connection with the survey for patent? The COURT.—I don't see any millsites on this map, exhibit "Y." A. The claims marked in large letters are millsites. The COURT.—Those big capital letters on exhibit "Y"— A. Represent millsites that belong to the Alaska Juneau, that application has been made for patent for. Q. Application has been made for patent for all those millsites and are now pending? A. Yes, sir. Q. And the Abe Lincoln and General Grant lodes are also correctly platted on that map? A. To the best of my knowledge and belief. Q. As near as you can check them up? A. Yes.

[Testimony of F. H. Lenore, for Plaintiff.]

F. H. LENORE, a witness called on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. Mr. Lenore, state your name, please. A. Frank Howard Lenore. Q. Where do you reside? A. In Treadwell. Q. You are a surveyor by profession? A. Yes; I am. Q. Do you know Mr. B. D. Stewart? A. I do. Q. Did you work with Mr. B. D. Stewart during the past year or two? A. I did. Q. Do you know the A, L, T and other millsites composing the Alaska Juneau group of millsites on the shore of Gastineau Channel? A. I do. Q. Do you know who surveyed those for patent? A. I do. Q. And who made the survey? A. Mr. B. D. Stewart. Q. Were you with him at the time? A. I was. Q. Assisted him in the work? A. I did. Q. Calling your attention to exhibit "Y," I will ask you if all those millsites are correctly delineated upon that map as you and Mr. Stewart surveyed them for patent? A. They are. [133—65] Q. Do you know where the City Road is? A. Yes, sir. Q. Is that correctly platted on that map? A. It is. Q. And the Alaska Juneau wharf and the other things shown on the map are also correctly platted? A. Yes, sir. Q. Do you know where the thousand-foot Jorgenson reservation is, as described in the deeds that have been offered in evidence? A. Well, the northwest boundary is 555 feet from corner No. 1 of the Juneau Townsite Survey, No. 780. Q. That thousand-foot

(Testimony of F. H. Lenore.)

reservation as described in the deed—is that correctly platted on exhibit “Y”? A. It is. Q. Now, with reference to the posts at the millsite corners, Mr. Lenore—do you know whether those were in the ground? A. Yes, sir. Q. Did you find all the corners in the ground of the A millsite at the time of making the survey? A. All but one. Q. Which corner was that? A. That was corner No. 2—it is this corner here (indicating). Q. That lower corner? A. Yes. Q. That was out at the time you made the survey? A. Yes. Q. When was that survey made? A. For patent? Q. Yes. A. 1913. Q. You re-established that corner at that time? A. Yes. Q. How about the other millsites—were the corners in place? A. All except three, I believe. Q. How about the corners of the L millsite, for instance? A. They were all in except this one and this one (indicating). Q. The T millsite? A. They were all in. Q. G millsite? A. The G millsite were all in. Q. The Z millsite? A. The Z millsite were in. Q. The U millsite? A. The U millsite were in. Q. And the boundaries of the A millsite as marked upon the ground by stakes when you went there to survey could be readily traced? A. All except the tide-line. Q. Of course, that had to be meandered? A. Meandered. Q. But the lines extending down to the tide-land could be readily traced? A. Yes. Q. How about the L millsite? A. Same way. Q. And the G millsite? A. Same way. Q. Could the boundaries of the U millsite as marked upon the ground be readily traced? A. Yes, sir. Q. And the bound-

(Testimony of F. H. Lenore.)

aries of the Z millsite could be readily traced? A.

Yes. Q. When you say all [134—66] except the tide-line, the tide-line could be readily traced except it required some measurements to ascertain mean high tide? A. Yes. Q. Aside from that there was

no difficulty in tracing any of the boundaries? A.

Yes. Q. And the shore line, of course, was visible and could be traced upon the beach at the time? A.

Yes, sir. Q. When you made the survey in 1913, what, if anything, did you do in a way of establishing permanent corners at the northeast corners of the A, L and G millsites—for the millsites you surveyed for patent at that time? A. Where it was possible we

put a post 4x4, by hand, down anyway between 18 to 26 inches in the ground with a mound of earth and stones about it, and where it was possible we put as many as two or three or four bearings to this post; where a post was not practicable, we put a stone; and where we found a rock, that is, a large boulder, we used that, because it is less trouble and will last longer. Q. The corner occurring at each angle of the various millsites I have named were, in 1913,

marked by you by permanent monuments? A. Yes, sir. Q. These monuments are still in existence, as far as you know? A. As far as I know. Q. Do you

know who was in possession of those millsites at the time you made the survey, and prior to that time? A. The Alaska Juneau Gold Mining Company. Q. Do you know who has been in possession of them ever

since? A. The Alaska Juneau Gold Mining Company. Q. Do you know how long prior to that time

(Testimony of F. H. Lenore.)

the Alaska Juneau Company had been in possession of them? A. Well, anyway, from a year to two years. Q. From the date of the location? A. Yes; date of the location notice. Q. Been in possession of the land embraced in the [135—67] various millsites shown upon exhibit "Y"? A. Yes. Q. And making improvements upon the surface ground? A. Yes. Q. Do you know what year they commenced doing work on the ground there, Mr. Lenore? A. I think it was in the summer of 1912 that they started work on the millsites. Q. That they worked on the ground here? A. Yes. Q. Work further up town commenced previous to that? A. Yes. Q. But that is when they put their first structures on the ground? A. That is when they first started doing work—I think it was in the latter part of 1912. Q. You mean on the millsites? A. On the millsites; yes, sir. Q. And from that time they have been continuously working on the ground? A. Yes, sir. Q. On each of the millsites shown on the map? A. Yes.

Cross-examination by Mr. RUSTGARD.

Q. You helped to make this plat, section F, Mineral Survey No. 982-A and B, did you? A. Yes, sir. Q. At the time you made the survey in the spring or early part of 1913, did you make the survey for the purpose of a patent survey? A. Yes, sir. Q. Have you and Stewart made all the surveys for the Alaska Juneau on that ground since you started to make that survey in the spring of 1913? A. All the patent work; yes, sir.

Mr. SIMON HELLENTHAL.—I offer deed from

(Testimony of F. H. Lenore.)

W. A. Kelley as administrator of the estate of Annie Sullivan to Charlie Bowman (Shaw-eh-Nah) and Casiar Mary, to the Chief Johnson tract. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "C-1.") (This exhibit is a deed purporting to convey what is designated as lot 2 on exhibit "Y.") Mr HELLEN-THAL.—Another deed from Charley Bowman to Peder O. Holsboe and Nels Pearson to the same ground. Mr. RUSTGARD.—I object to that because there is no evidence to show that the party purporting to convey this property was seized of the property, or had any authority to convey, or had any property whatever to convey. The COURT.—Very well, the objection is overruled. If he hasn't, of course the deed don't amount to anything anyhow. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "D-1.") [136—68] (This exhibit purports to convey the same premises as exhibit "C-1.") Mr. HELLEN-THAL.—I next offer deed from Peder Holsboe and Nels Pearson to Knudt Topnas. Mr. RUSTGARD.—I make the same objection to this deed. The COURT.—The same ruling. (Whereupon said deed was received in evidence and marked Alaska Juneau Company's Exhibit "E-1.") (Duly recorded affidavits for the anual labor of \$100.00 per annum for 1910 to 1915, inclusive, on Abe Lincoln and General Grant lodes received in evidence.)

[Testimony of John Reck, for Plaintiff.]

JOHN RECK, a witness called on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. You at one time were one of the owners of the Abe Lincoln and General Grant claims? A. Yes, [137—69] sir. Q. When did you first become interested in them? A. In 1899. Q. At that time were the stakes of the claims in place—the corner stakes? Mr. RUSTGARD.—I object to that as immaterial and irrelevant. The COURT.—Objection overruled. A. The front stakes were in place at that time; I don't know about the back ones at that time. Q. When were they put in on the back? A. Now, I wouldn't say; 1901 or '02. We had the claim surveyed for patent, I think it was in 1901. Q. Were all the stakes in place in 1901? A. Yes, sir. Q. And could the boundaries of the claims be readily traced from the markings on the ground? A. Yes, sir. Q. Do you know where the discovery was on the Abe Lincoln? A. It was right back of the old slaughter-house, not quite half way up the hillside. Q. What was there there in the way of rock in place bearing quartz? A. There was a gully running up to a well-defined ledge there; we drove in a tunnel on it about 40 or 50 feet, and there was rock in place all the way through that distance. Q. What did the ledge carry? A. She carried from a trace to \$4.00; I think there were one or two assays run a little over that. Q. In what? A. Gold. Q. How

(Testimony of John Reck.)

about the General Grant—do you know where the discovery was on that claim? A. On General Grant the discovery was down on the lower end, it is where the Alaska Juneau dock is now; there was a ledge running up the hill—not straight up but kind of angling up, this way (indicating). Q. What did that ledge carry? A. That carried about \$2.00. Q. In what? A. Gold. Q. Do you know whether the assessment work was done each year at the time the claims were sold to the Alaska Juneau Company? A. No; it was not done; it *was done* until we got into the land office and then there wasn't any work done every year until the last year we done work again. Q. You got a final receipt from the land office? A. No; we got the first receipt but not the final receipt. Q. You got the receiver's receipt after the entry had been made? A. Yes; the final receipt. Q. It was after that, Mr. Reck, the purchase was completed? [138—70] A. Yes, sir. Q. That was just before the Alaska Juneau millsites were located? A. It was after the millsite was located. Q. What year was it held nonmineral? A. I think it was 1912 or '11. Q. 1911, somewhere, wasn't it? A. I think it was 1911, I will tell you why—I know that it was reversed afterwards because we had partly sold a strip of land to Mr. Bradley for a millsite on the claims. Q. You know Mr. Bradley paid for the claims long after the decision was rendered by the department, don't you? A. Yes, sir. Q. The department had already held the ground nonmineral when Mr. Bradley bought the

(Testimony of John Reck.)

ground? A. Yes, sir. Q. And the millsites were located? A. The millsites were located ahead of that. Q. Don't you know the millsites were located the next day? Mr. RUSTGARD.—I object to that as not the best evidence. A. I wish to state this: These millsites were located ahead of that because there were stakes all over it and we had an agreement with Mr. Bradley in regard to it. Q. He was to use it for a millsite? A. Yes. Q. But what I am speaking of now, Mr. Reck, is it not the fact that he was to use the Abe Lincoln and General Grant for millsites, but he afterwards located millsites on them? A. Yes, sir. Q. That was after the department held the ground nonmineral? A. Yes. Mr. HELLENTHAL.—You can cross-examine.

Cross-examination by Mr. RUSTGARD.

Q. Do you know the date of the location of the millsites? A. I do not. Q. Do you know the date of the decision of the department? A. No. Mr. HELLENTHAL.—Just one question—Even before the location of these millsites on the ground, the Alaska Juneau had done some work on the claims towards making a millsite of it? A. Yes.

Mr. RUSTGARD.—Now, may it please the Court, Mr. Hellenthal and myself reached an agreement after adjournment of court last night in regard to the Warner survey of the mean high tide line, and I will dictate the agreement into the record:

It is stipulated and agreed by and between the parties [139—71] that, for the purposes of these cases now on trial and for no other purpose, the line

(Testimony of John Reck.)

on Worthen Company's Exhibit No. 8 designated as "Warner's Mean High Tide Line" is the true line of mean high tide from corner No. 1 of the Townsite of Juneau and southeasterly to a point approximately 100 feet southeasterly from corner No. 4 on the General Grant lode, the same being marked in pencil on the said Exhibit 8 as the southeasterly end Jorgenson one thousand foot reservation; and that from the last-named point in a southeasterly direction the line of mean high tide as shown on Alaska Juneau Company's Exhibit "Y" is the correct and true line of mean high tide; that is to say, to the south of the southerly end of the said Jorgenson thousand-foot reservation, as marked on Exhibit 8 and also as marked on Alaska Juneau Company's Exhibit "Y," thence southward up to and beyond the Alaska Juneau wharf, as shown on said exhibits the line of ordinary high tide is identical with the seaward boundaries of the A, U and L millsites as delineated on said Alaska Juneau Company's Exhibit "Y." Mr. HELLENTHAL.—That is the stipulation. Mr. RUSTGARD.—May it please the Court, in connection with the stipulation entered of record, I offer in evidence this tracing and ask that it be marked Worthen Lumber Mills Exhibit No. 8. The COURT.—Very well; it may be received for the purpose of intelligently understanding the stipulation. (Whereupon said tracing was received in evidence and marked Worthen Company's Exhibit No. 8 and is hereto attached). (This exhibit is the tracing from which exhibit No. 1 was printed.)

[Testimony of W. R. Lindsay, for Plaintiff.]

W. R. LINDSAY.—A witness called on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. State your name, Mr. Lindsay, please. A. W. R. Lindsay. Q. Where do you reside? A. Juneau. Q. Do you know the Alaska Juneau Gold Mining Company? A. Yes. Q. Were you ever employed by that company? A. I was. Q. Do you know where the A millsite is located, Mr. Lindsay? A. Yes. Q. Do you know when it was located? I call your attention to the location notice of the A millsite as offered in evidence, for the purpose of refreshing your memory as to the date—do you know [140—72] now when the A millsite was located? A. The location notice is July 16th, 1911. Q. At that time who were you employed by? Mr. RUSTGARD.—That is objected to as immaterial and irrelevant; the location notice shows that he located the millsite for himself. Mr. HELLENTHAL.—No, he didn't locate it at all; the location was by Bayless. Mr. RUSTGARD.—It is still immaterial and irrelevant. The COURT.—Objection overruled. A. Alaska Juneau Company. Q. Do you know Mr. Bayless? A. Yes. Q. For whom was he employed at that time? Mr. RUSTGARD.—I object to it as immaterial and irrelevant. The COURT.—I suppose you mean to prove by him it was located for these people? Mr. HELLENTHAL.—Mr. Bayless simply worked for the Alaska Juneau Company—signed

(Testimony of W. R. Lindsay.)

his own name but located it for the Treadwell people; he was working under Mr. Lindsay, and Mr. Lindsay can testify as to the facts and circumstances. The

COURT.—If he knows, if he has any knowledge, he may testify. Q. You know Mr. Bayless was working under you, wasn't he, Mr. Lindsay? A. He was.

Q. Who directed his work? A. I did. Q. Now, do you know how Mr. Bayless located the A mill-site—how and for whom? Mr. RUSTGARD.—I

object to that as containing two questions in one and as immaterial and irrelevant. Mr. HELLEN-

THAL.—I am simply asking him now whether he knows. The COURT.—You may answer that—

whether you know. A. Yes; I know. Q. Now, for whom was the A millsite located? Mr. RUST-

GARD.—I object to that as immaterial and irrelevant. The COURT.—Well, if he knows he may tes-

tify, subject to cross-examination as to how he knows and what he knows about it; anybody who knows about a thing can testify—the weight of it is to be

determined afterwards. Q. For whom was Mr. Bayless acting in making the location of the A mill-

site? A. The Alaska Juneau. Q. Under whose di-

rections? A. Under my directions. Q. Did you direct him to locate the millsite as he did? A. Yes.

Q. Mr. Bayless has also located some lode claims in the Basin in the same way? Mr. RUSTGARD.—

I object to that as [141—73] leading and also immaterial. Q. What has Mr. Bayless done in the

Basin in the way of locating lode claims for the Alaska Juneau Company? Mr. RUSTGARD.—I

(Testimony of W. R. Lindsay.)

object to that as immaterial and irrelevant. The

COURT.—How is that relevant? Mr. HELEN-

THAL.—I don't think it is very important—it shows that he located some claims in the basin—just part of the transaction. The COURT.—The objection

will be sustained. Q. Now, Mr. Lindsay, I wish you would tell the Court what you and Mr. Bayless did—you were also connected with the location of this claim—you were also there on the ground? A. Yes;

I was there. Q. And did the surveying in connection with the location? A. Yes. Q. Now, what

was done in the way of putting stakes in the ground at the time the location was made, as fixed by the date of the notice? A. The stakes were put in as the

notice calls for, except one corner runs out into the channel and the witness corner was put up for that. Q. There was a stake placed at each corner

and set, only where the stake couldn't be placed and the witness was staked for that? A. Yes. Q. Was

the witness corner marked properly as a witness corner? A. It was marked as a witness corner; yes.

Q. Was it indicated on the shore? A. Yes. Q.

How about the other stakes? A. They were all

marked. Q. How were they marked? A. Marked

as called for in the notice. Q. Marked the corners

of the claims as called for in the notice? A. Yes.

Q. What do you say as to whether the boundary of

the A millsite—as to whether the boundaries were so

marked that they could or could not be readily

traced? Mr. RUSTGARD.—I object to that as in-

competent and calling for the conclusion of the wit-

(Testimony of W. R. Lindsay.)

ness. The COURT.—No; I don't think so—it is a little leading. Q.—Could the boundaries of the A millsite as marked upon the ground by yourself and Mr. Bayless at the time of its location be readily traced? Mr. RUSTGARD.—Same objection to that. The COURT.—The objection was that it is incompetent, irrelevant and immaterial and calls for a conclusion of the witness—that objection is overruled; the Court said it was leading—the second question is as leading as the first—change the form of it. Q. How were the boundaries of the A millsite marked upon the ground by you and Mr. Bayless, [142—74] with reference to whether or not the same could be readily traced? A. The stakes were all in and the side lines given; anyone looking for them, I guess, could find them. Q. Anyone could find the lines? A. I think so. Q. They could be readily traced? A. Yes. Q. At the time you made the location of the A, you also located the L in the same way, didn't you? A. Yes, sir. Q. How were the boundaries of the L marked on the ground? The COURT.—Just a minute—where is the L? Mr. HELLENTHAL.—Right next to the A. Q. What did you do in the way of marking the boundaries of the L? A. Put in the corner stakes and cut the side lines. Q. Did you also cut the side lines of the A? A. Yes, sir. Q. Brushed them out? A. Yes. Q. Now, how was the L marked with reference to whether the boundaries could or could not be readily traced? A. Oh, they could be found all right. Q. They could be traced, then? A. Yes. Q. Were the stakes marked

(Testimony of W. R. Lindsay.)

for the corners? A. Yes. Q. That was located by yourself, wasn't it? A. Yes. Q. In what capacity were you acting—for whom did you make the location? Mr. RUSTGARD.—I object to that as immaterial and irrelevant. The COURT.—Objection overruled. A. I was acting for the Alaska Juneau. Q. And you signed the paper notice with your own name in the same way? A. Yes. Q. What did you do thereafter in the way of transferring the paper title? A. I deeded the claim to the company. Q. Were you present when Mr. Bayless did the same thing? A. I don't remember whether I was or not. Q. You do know that both you and Mr. Bayless were working for the company and made both the A and L locations for the company? Mr. RUSTGARD.—I object to that as immaterial, irrelevant and leading. The COURT.—It is repetition. Q. I say you do know that. A. Yes. Q. Now, at the time you made these locations in July, 1911, there were also a lot of other millsites located in the same vicinity? A. Yes. Q. In the same manner, for the Alaska Juneau Company? A. Yes. Q. What, if anything, did you observe in the way of work on this group of millsites—at that time was there any work being carried on there? A. What time was that? Q. In July, 1911, when [143—75] you made the surveys? A. I couldn't say just when it was, but there was work done upon some of the millsites that summer, but I couldn't say just what time it was. Q. You couldn't say what time it was, but in the summer of 1911, anyway? A. Yes.

(Testimony of W. R. Lindsay.)

Cross-examination by Mr. RUSTGARD.

Q. Why didn't you sign the location notice as agent for the Alaska Juneau Company if you really acted in that capacity? A. Because I was directed to locate it myself and deed it to the company. Q. For the benefit of the company? A. Yes. Q. You were in no way personally interested in the millsite when you made the location? A. No. Q. How long after you made the location did you sign the deed to it, do you remember? A. It was a very short time, but I couldn't say when it was. Q. Do you know what is the reason the Alaska Juneau Company didn't sign their own name to it? A. No; I don't know what the reason was. ~~Mr. RUSTGARD.—That is all.~~ ~~Mr. HELLENTHAL.—That is all, Mr. Lindsay.~~

[**Testimony of R. G. Wayland, for Plaintiff.**]

R. G. WAYLAND, a witness called on behalf of the Alaska Juneau Gold Mining Company, being first duly sworn, testified as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. Mr. Wayland, your name is R. G. Wayland? A. Yes, sir. Q. You are the Assistant General Superintendent of the Alaska Juneau Company? A. The Alaska Treadwell. Q. You are not connected with the Alaska Juneau Company? A. No. Q. Were you employed by the Alaska Juneau Company some time before this? A. Up until September of last year. Q. Were you employed by the Alaska Juneau Company in the year 1909, 1910, 1911, 1912, 1913 and 1914? A. Yes, sir. Q. In what capacity? A. Surveyor. Q. Had charge of the Engineering

(Testimony of R. G. Wayland.)

Department? A. Yes. Q. Are you familiar with the ground embraced in the A, L, U and G millsites?

A. Yes. Q. You are a mining engineer, Mr. Wayland? A. Yes. Q. Have you examined the ground

of the A, U and L millsites with reference to ascertaining whether it is mineral or nonmineral? A.

Yes. Q. Do you know what the character of those three sites is with reference to being mineral or non-

mineral? A. Yes. Q. What is it? A. Nonmineral. [144—76] Q. Of all three claims I have

named? A. As far as I can see, my opinion of it is nonmineral. Q. Do you know where the stakes on

the A millsite were placed? A. Yes. Q. How long after the location of the millsite were you on the

ground? A. Within a week or two. Q. What did you see on the ground at that time in the way of

stakes? A. I saw all the stakes on the upper side line and followed the brushed outlines, and I saw

one or two of the stakes on the beach. Q. The lines were brushed out as well as staked? A. Yes. Q.

Were the stakes marked as described? A. They were marked on the corners of the millsites. Q.

How about the L millsite? A. L millsite marked the same way, with L millsite corners. Q. How was

the A millsite marked with reference to whether its boundaries could or could not be readily traced? A.

Its boundaries could be readily traced. Q. How about the L millsite? A. Its boundaries could be

readily traced. Q. Do you know where the U millsite is? A. Yes. Q. Do you know when that was

located? A. Located in February, 1913. Q. Were

(Testimony of R. G. Wayland.)

you on the ground shortly after it was located? A.

Within about a week. Q. What did you find in the way of stakes? A. I found three stakes set for the

corners, and I think there was a pile marked for the witness corner, for the fourth stake; it was situated in the channel at a point where it could not be set.

Q. How about the stakes, were they marked for the corners to show what they represent? A. Yes. Q.

Each stake was marked so as to indicate what the stake stood for? A. Yes. How were the bound-

aries of that location marked with reference to whether or not they could be readily traced? A.

They could be readily traced, because you could stand at one stake and see the other two. Q. Now, Mr.

Wayland, do you remember when the Alaska Juneau Company commenced work on that group of

millsites? A. Yes. Q. Looking towards the construction of the milling plant on it? A. Yes. Q.

What time was that? A. That was in the summer of 1911. Q. What do you say as to whether [145—

77] or not that work then commenced has been carried on continuously ever since during the work-

ing season? A. It has been carried on continuously during the working season. Q. Ever since? A.

Ever since. Q. They have had some men at work there all the time from 1911 up to the present time,

except in the winter-time when work could not be carried on? A. Yes.

[**Testimony of P. R. Bradley, for Plaintiff
(Recalled).**]

P. R. BRADLEY, a witness recalled for further cross-examination, having been previously sworn, testified as follows:

Cross-examination (Cont'd.) by Mr. RUSTGARD.

Have you had a chance to refresh your memory as to the amount of waterfront you have south of your wharf in this town? A. I haven't, no; I didn't measure that up since I testified yesterday. Q. Now, I will ask you whether or not you haven't a waterfront from your wharf in a southeasterly direction down to Snowslide Creek, approximately 7,000 feet? A. I believe that to be substantially correct. Q. You have south of your wharf the E and D millsites, the R. lode, and the Utah running lengthwise with the beach—that is a patented claim? A. Yes. Q. And next to that the Q lode, and next to that the Queen lode, and next below that the King lode? A. Yes. Q. The lode claims are approximately 1500 feet long, except the Q lode, which is in round numbers 600 feet on the beach? A. Yes. Q. The whole thing amounting to approximately 7,200 feet? A. About that. Q. You spoke about some slides—is there any evidence of any slide in the neighborhood of your wharf, except right at the point where your track goes from the wharf and goes up the hillside, and isn't that track out clear through that little slide? A. I don't understand the question, what you mean by slide—snowslide or landslide? Q. Any kind of

(Testimony of P. R. Bradley.)

a slide? A. Yes; there is evidence of slide in a good many places. Q. Near the beach? A. Near the beach and above the beach. Now, take it near the beach—is there any evidence of any slide in that particular place near the place where your track runs up the hill? A. The only evidence at this particular point is right here (indicating). Q. That is right above your wharf as shown on exhibit “Y”? A. Yes. [146—78] A. *Yes.* Q. That hillside is pretty well timbered, isn’t it? A. It is at points. Q. You can look at it from the window here? A. Yes; but you cannot see between the places that are not timbered looking from this direction. Q. You spoke about the area in comparison with the Treadwell. Now, the Treadwell Company and consolidated companies—whatever you may call them—operate three or four mines on Douglas Island, across the channel here? A. Yes, sir. Q. How many mines are they operating? A. Three mines. Q. And they have got three or four different mills? A. Yes. Q. Scattered how far apart? A. I cannot give you the exact distances apart, but the entire area is one and eighth-tenths miles in extent. Q. There is one mill at the north-westerly end and another mill and mine at the south-easterly end of that stretch? A. That is right. Q. And the mine and the mill are on the same area—are occupying the same area, aren’t they, the mines and the mills on the Island? A. With the exception of that mill which is at the westerly end of the property; there is no mine underneath that mill. Q. The mine is further south? A. Further to the east. Q. Un-

(Testimony of P. R. Bradley.)

derneath the tunnel chiefly—the Ready Bullion you are referring to? A. No; the 300 mill. Q. In this particular place you will have the milling plant on the beach here in question, while the mine is about two miles on the other side of the mountain up in the Gold Creek basin—that is correct? A. Yes. Q. Your mining crew will be up in the Basin and your milling crew will be down here? A. Yes. Mr. RUSTGARD.—I think that is all.

Redirect Examination by Mr. JACK HELLEN-
THAL.

Q. Those slides [147—79] which occurred above the Alaska Juneau wharf—what were they, land or snowslides? A. Landslides. Q. That was a small landslide that occurred there a few years ago? A. I believe that was the case—I didn't see it. Q. The ground above has been bulkheaded to prevent a recurrence? A. To a certain extent. Q. The slide you spoke of yesterday as being such an injury to wharf construction to the south of your present wharf were not landslides but snowslides, as I understand it? A. Yes; snowslides as I meant it understood. Q. That part south of your wharf is subject to snowslides, with the exception of isolated spots? A. That is what I wanted to say. Q. How is your powder-house constructed? A. In the form of a tunnel in solid rock. Q. Built so the snowslides could not hit it? A. Yes.

Recross-examination by Mr. RUSTGARD.

Q. There are a string of small cabins on the beach below your wharf? A. There a few small cabins.

(Testimony of P. R. Bradley.)

Q. Look as though they had been there a good many years, don't they? A. I stated in my testimony yesterday there are certain isolated spots free from snowslides. Q. Have you ever seen any snowslides there anywhere? A. No. Q. Have you ever heard of a snowslide except at Snowslide Creek? A. Yes. Q. Whereabouts? A. Why, I understand there were some photographs taken in 1912 showing slides over the entire extent of that hillside. Q. You have leased a lot of ground down here to the Standard Oil Company, haven't you? A. Yes; that is one of the isolated spots. Q. They have built oil tanks there, and their houses? A. Yes. Q. And timber is growing all over the hillside there? A. No; not all over the hillside. Mr. RUSTGARD.—That's all.

Plaintiff introduced in evidence Exhibit "K-1," which is notice of location of "U" millsite, copy attached; Exhibit "N-1," which is deed for "U" millsite from the locator to plaintiff, copy attached; Exhibit "O-1," which is affidavit of assessment work on Abe Lincoln and General Grant lodes for 1911 and 1912.

[Testimony of E. W. Pettit, for Defendant (in Rebuttal).]

REBUTTAL.

E. W. PETTIT, a witness called on behalf of the Worthen Lumber Mills, being duly sworn, testified in rebuttal as follows: [148—80]

Direct Examination by Mr. RUSTGARD.

Q. What is your official position, Mr. Pettit? A.

(Testimony of E. W. Pettit.)

Clerk of the city of Juneau. Q. Have you in your possession the records relating to the passage of Ordinance No. 87 of the City of Juneau? A. I have.

Q. This volume is a book containing the minutes of the proceedings of the City Council at a meeting held July 19, 1907? A. It is.

Q. And is in your possession as city clerk? (Exhibiting book to witness.)

A. It is. Mr. RUSTGARD.—I offer in evidence that part of the minutes of the city council of the town of Juneau for July 19, 1907, relating to the adoption of Ordinance No. 87, extending and laying out Franklin Avenue. Mr. HELLENTHAL.—I shall object to Ordinance 87. Mr. RUSTGARD.—

I will read it. The COURT.—Now, Mr. Rustgard, in order to get the thing into shape—you are offering to read Ordinance 87? Mr. RUSTGARD.—Yes.

The COURT.—Then offer the ordinance. Mr.

RUSTGARD.—We haven't got it. Mr. HELLENTHAL.—If they haven't got it I shall object to it.

Mr. RUSTGARD.—We can probably get the ordinance here. The COURT.—I will admit that sub-

ject to being connected. Mr. RUSTGARD.—

(Reading from minute book of the city council of the town of Juneau, from the minutes of July 19, 1907)

—“The Committee on Streets, Lights, Sewerage and Wharfage reported recommending the passage of an ordinance introduced at a council meeting held July 2, 1907, entitled ‘An ordinance providing for the extension, laying out and opening of Franklin Street in the City of Juneau.’ The ordinance was numbered No. 87 and read. Mr. Reck moved that the ordi-

(Testimony of E. W. Pettit.)

nance be adopted, seconded by Mr. McCloskey. The Chair ordered the roll called. Councilmen Jaeger, McCloskey, Reck, Young and Zenger voted aye; Councilmen Forrest and Ruhe absent. Chair declared the motion carried and the ordinance adopted."

Mr. Pettit, do you have ordinance No. 87? A. I have a copy that was taken out of the "Daily Record Miner" for July 24, 1907—one of the publications. Mr. RUSTGARD.—I didn't read all of this. (Continues reading.)—"Mr. McCloskey offered the following resolution: Resolved, That the map made by C. E. Davidson, July, 1907, of that portion of Franklin Street affected by ordinance No. 87 be accepted and approved by the Council. Seconded by Mr. Reck. Chair ordered the roll called; Councilmen Jaeger, McCloskey, Reck, Young and Zenger voted aye; [149—81] Councilmen Forrest and Ruhe absent. Chair declared the motion carried." Q. You say you haven't that ordinance? A. That is a copy. Q. Is the original ordinance, signed by the president pro tem, Mr. Jaeger, in the possession of the city clerk at the present time? A. It is not. Q. Where is it? A. I don't know. Q. Have you made a search to find it? A. I have. Q. How long, as far as you know, has it been gone from the records? A. Well, shortly after I took office, over a year ago, I made a search of all the ordinances and that was one of the missing—there are several missing from the records. Q. Have you the map referred to in this resolution of the city council at this meeting of July

(Testimony of E. W. Pettit.)

19, 1907, which I have just read? A. I have. Q. Is this the map? A. It is. Q. That map is now the property of the city and a part of the records of the city clerk's office? A. Yes. Q. Is there any other map referring to that subject in the city clerk's office? A. I have been unable to find any. Mr. RUSTGARD.—I now offer this map, together with Ordinance No. 87, both in evidence. Mr. HELLEN-THAL.—I want to ask Mr. Pettit a few questions about this ordinance: Q. Mr. Pettit, you say that the Ordinance No. 87 you haven't got? A. Yes, sir. Q. That has been lost? A. It has as far as I know. Q. When you took office a year ago you looked over the ordinances and checked them up and there are several missing? A. Yes. Q. Then you went out among the newspaper offices and got a copy of them? A. That is true. Q. You went to the "Record Miner" and found where Ordinance No. 87 was copied in the paper and substituted it in your files? A. It was taken from the copy in the Governor's office—we didn't clip the paper. Q. You went to the Governor's office and found there an old copy of the "Record Miner" in which Ordinance No. 87 purported to be published? A. Not personally. Q. You never compared that with the original? A. Not personally. Q. You don't know whether it is a copy of Ordinance No. 87 or not? A. I do not. Q. All you know is there was a copy of No. 87 [150—82] purported to be published in the "Record Miner" and you took that and substituted it in your record?

(Testimony of E. W. Pettit.)

A. That is true. Q. And you took that as Ordinance No. 87? A. That is true. Mr. RUSTGARD.—I offer the ordinance. Mr. HELLENTHAL.—I object to it for the reason that the copy offered in evidence is not authenticated, and an ordinance of the city cannot be proven by a copy of that character. The only way an ordinance can be proved is by producing the ordinance itself and offering it in evidence—or a certified copy of it, at least, and I don't know whether a certified copy of an ordinance would be enough. I have the further objection to it, that nothing has ever been done under this ordinance—it is merely a paper resolution, and the Franklin Street now referred to as being laid out is not laid out in accordance with this ordinance. The COURT.—The last objection will be overruled at once. Now, the first objection—this is a copy of a copy, Mr. Rustgard. Mr. RUSTGARD.—Yes, I realize that, your Honor—it is a copy of a copy. If counsel makes the objection that we ought to have offered the paper from which it was taken, I will get the paper. Mr. HELLENTHAL.—I am not objecting to the paper; I don't think the paper would be any better than this. Mr. RUSTGARD.—If counsel prefers the newspaper—Mr. HELLENTHAL.—I will let the record show that this is the newspaper to which Mr. Pettit testified. Mr. RUSTGARD.—I will call the Court's attention to the fact that the ordinance purports to be published at the expense of the city counsel, by reason of a resolution of the council. The COURT.—I think that the newspaper

(Testimony of E. W. Pettit.)

would be all right, and of course it is under the agreement that that may be considered the newspaper—that would be all right if you had somebody that knew anything about the publication at the time, here. You put Mr. Pettit on the stand, who has only been city clerk for a year, and you try to prove by him that he saw a publication in the Record Miner—that is what it amounts to—in 1907. Now, if you bring the editor or publisher of the paper—in 1907—or even bring the person who was city clerk at that time, who knows something about [151—83] these things, then it might be admissible. Mr. RUSTGARD.—I will ask a few questions and overcome that. Q. At the time this ordinance was published, who was the city clerk—can you tell from the records? A. Nathanael Greene. Q. Where is he now? A. To the westward—Cordova, I believe. Q. He isn't in the city? A. He is not in the city. Q. Is the Record Miner a publication at the present time? A. No. Q. How long since that suspended? A. Oh, it must have been five or six years ago. Q. Do you know who was the editor of that paper at the time of the purported publication of this ordinance? A. I couldn't say positively—I think Frame, but I couldn't say positively. Q. Is he in the city? A. No. Q. Do you know where he is? A. The last I heard of him he was out to the westward.—Valdez, I think. Q. I don't think there is anything else I care to ask you, Mr. Pettit.

[Testimony of E. R. Jaeger, for Defendant (in Rebuttal).]

Alaska Juneau Company's Exhibit "P-1" received in evidence, it being certificate of payment of territorial license fee for 1914.

E. R. JAEGER, a witness called on behalf of the Worthen Lumber Mills, being duly sworn, testified in rebuttal as follows:

Direct Examination by Mr. RUSTGARD.

Q. Your name is E. R. Jaeger? A. Yes, sir.
Q. You live here in Juneau? A. Yes. Q. Have lived here for several years last past? A. Yes.
Q. Did you occupy any official position with the town government during the year 1907? A. Yes.
Q. What position? A. Why, I was a member of the city council. Q. During that time did you ever act as mayor pro tem? A. I did. Q. I show you a document marked Ordinance No. 87, and ask you if you are familiar with the document? A. I have looked the document over and I remember of having passed an ordinance something similar, if not a copy of this at the time that I was acting mayor. Q. Do you remember whether you signed such an ordinance as acting mayor? A. Yes; I did. Q. Do you remember in what paper that ordinance was published? A. Why, I remember that during that particular term the Record Miner was the official publication for the city; I remember that because I remember that Mr. Zenger, down here, was chairman of the committee on printing and publication

(Testimony of E. R. Jaeger.)

and I remember that they had quite a time the early summer before that letting the contract for the printing for that year. Q. The ordinances passed by the [152—84] city council during that term were published officially in the *Record Miner*?

A. That is my impression of it. Q. I will ask you to look at this blue-print and I direct your attention especially to your name, E. R. Jaeger, signed to a certificate, and ask you if you recognize that signature? A. Yes, I recognize the signature.

Q. Whose signature is it? A. My signature.

Q. That is a blue-print of it? A. Yes, sir; I remember of signing that tracing—I remember of signing the tracing made by the engineers, and also remember that we had those metes and bounds checked up and had a good deal of trouble in getting it finally adjusted—I know we had some trouble and it hung fire a long time; just what it was I don't remember now, but I remember we had several engineers on the job there, one checked up the other, and just what the delay was, I don't remember now, because I don't remember that much about it. Q. But after it was finally passed and adopted by the city council you attested your signature to it? A. I did to that tracing. This here (referring to blue-print) has the appearance of being a blue-print made from the tracing—I would say that from the inspection of Mr. Greene's and my signature. Q. Do you recognize Mr. Greene's signature? A. Yes; I think that is Mr. Greene's signature. Q. Nathanael Greene, who was the city clerk at the time? A. City clerk.

(Testimony of E. R. Jaeger.)

Mr. RUSTGARD.—I again offer the ordinance and this map in evidence. Mr. HELLENTHAL.—I just want to ask the witness a question or two: Q. (By Mr. Hellenthal.) Mr. Jaeger, you don't know whether the document offered in evidence is an exact copy of Ordinance No. 87 or not—you never compared it? A. I never compared it, no. Q. You couldn't testify that that is a copy of the ordinance that was passed, from your own knowledge? A. No, not from my own knowledge, but if the document on the desk is a copy of what was published, Mr. Greene was a man that was very methodical—Q. I am not asking you, Mr. Jaeger—A. Of my own knowledge? Q. You don't know of your own knowledge whether that is a copy of Ordinance No. 87 or not? A. I don't know anything about it; I never made a comparison and don't know. Mr. HELLENTHAL.—Same objection [153—85] I made before. The COURT.—Well, I am not sure about this, but I feel this way: This is an equity suit and if I finally determine, on a more thorough investigation, that this is not the way to prove an ordinance and it cannot be proved this way, it is easy enough then to disregard it—the objection will be overruled at this time. (Whereupon the map and ordinance above referred to were received in evidence and marked respectively Worthen Company's Exhibit 10 and 9 and are hereto attached.)

[Testimony of J. W. Bell, for Defendant.]

J. W. BELL, a witness called on behalf of the Worthen Lumber Mills, being first duly sworn, testified in rebuttal as follows:

Direct Examination by Mr. RUSTGARD.

Q. Your name is J. W. Bell? A. Yes, sir.
Q. You have lived in the city of Juneau for several years? A. Yes, sir. Q. Were you a member of the common council during the term of 1912? A. Yes, sir. Q. And during the spring and summer of the year? A. Yes, sir. Q. Do you know what work, if any, was done on what is known as lower Franklin Street, or Franklin Avenue in this city during that term? A. Yes. Q. What work was done? A. Well, there was a street built there from just this side of the oil-house clear to the city limits; part of it was graveled and part of it was planked. Q. The oil-house, that is a place situated on the northwesterly side of the sawmill property? A. Yes, sir. Q. Then the street was built past the sawmill property down to the city limits? A. Yes, sir. Q. Is that where the street is now? A. Yes, sir. Q. Built out of pilings, timbers, planks and railing? A. Yes, sir. Q. The same street that is there now? A. Yes, sir. Q. Has been there ever since? A. Yes, sir. Q. Who paid for it? A. The city council. Q. Out of city funds? A. Yes, sir. Q. And it has been used and occupied ever since as a public street and thoroughfare? A. Yes, sir. Q. One of the best travelled streets in the city?

(Testimony of J. W. Bell.)

A. I guess it is. Q. Do you remember what time the work was started? A. I think it was along about June; I couldn't say the exact date. Q. 1912?

A. 1912. [154—86] Q. They started at the lower

or town end of it? A. Well, we built both ways.

The COURT.—June, 1912? A. Yes; sometime during the summer; I don't remember the exact date now.

Q. You don't remember when it was completed? A. I do not. Q. It was during the summer?

A. Oh, yes. Q. And the Alaska Road

Commission extended the roadway towards Sheep

Creek? A. Yes, sir. Q. That is a distance of about three and one-half miles away from Juneau?

A. Yes, sir.

Cross-examination by Mr. JACK HELLENTHAL.

Q. The first work looking towards the construction of that street, Mr. Bell, was done by the city council, while you were on the council during the month of June or July, 1912, was it not? A. Yes, sir. Q. And

at that time was there any ordinance No. 87 on file in the office of the city clerk—that is, any ordinance laying out any street along there? A. Not that I

know of—I understood there was such an ordinance, but when we came to look it up my impression is we couldn't find it. Q. In laying out the street, you

didn't follow any ordinance previously passed? A. Not that I know of. Q. It wasn't done pursuant

to any ordinance previously passed? A. Not that I know of. Q. And the work was done by you in-

dependently of any ordinance? A. We made two surveys. Q. Where were those surveys made?

(Testimony of J. W. Bell.)

A. They started where the gravel road ends at the present time. Q. That is this side of the sawmill?

A. This side of the sawmill—this side of the Shattuck oil-house and back of the present street line.

Q. Up on the high land? A. Up on the high land way above high tide, and the other one run along the beach.

Q. And those two surveys were considered by the city council? A. By the street committee—

I think the city council accepted them on the report of the street committee. Q. It was determined that

the street along the beach would be the cheaper?

A. That was the idea. Q. And that is the reason the street along the beach was built and not the street on

the upland? A. Yes. Q. If the upland street had been the cheaper you would have built the street

there and not put the street on the beach? A. Yes.

Q. And all that surveying was done in the year of 1912 while you were on the council? A. Yes, sir.

Q. Without any reference to any previous ordinance or [155—87] any previous survey?

A. Yes, sir; we hired a surveyor and had the survey made. Q. Hired a surveyor, started on the work,

laid out the street and built it? A. Yes, sir. Q. In

building that street, Mr. Bell, from the sawmill to the end of the city limits, you had no negotiations

with the Alaska Juneau Gold Mining Company whatsoever? Mr. RUSTGARD.—I object to that as

immaterial. A. None whatever. Q. Was any permission had from the Alaska Juneau Gold Mining

Company to build the street? Mr. RUSTGARD.—I object to that as immaterial and irrelevant. The

(Testimony of J. W. Bell.)

COURT.—How so, Mr. Rustgard—How is it immaterial or irrelevant? Can the city lay out a street across a man's property without his consent? The objection will be overruled. A. Not to my recollection—we had no agreement with anyone. Q. Never spoke to the company or they never spoke to you about it? A. No, sir. Q. The street was simply built without any talking about it at all? A. Yes, sir.

[**Testimony of H. S. Worthen, for Defendant (in Rebuttal).**]

H. S. WORTHEN, a witness recalled on behalf of the Worthen Lumber Mills, having been previously sworn, testified on rebuttal as follows:

Direct Examination by Mr. RUSTGARD.

Q. Mr. Worthen, I show you a photograph and ask you what it represents and from what point it was taken, and when? A. Represents that portion of the mill, below the Jorgenson reservation line seaward. Q. Where was that picture taken from? A. Taken from the extreme end of the lumber-yard as we have it now constructed. Q. That is, from this point marked platform on exhibit No. 1? A. Yes. Q. From the lower or southernmost end? A. Yes; southeasterly end looking toward the fish-house. Q. The roadway on the left, I ask you whether or not that is Franklin Street, referred to in the proceedings? A. Yes, sir. Q. The house in the middle back of the picture—what house is that? A. House known as the fish-house. Q. I will ask

(Testimony of H. S. Worthen.)

you what time this picture was taken? A. It was taken April 14th, at 11 A. M., 1915. Q. Now, what difference is there in the situation at the time this picture was taken and the time the injunction was served upon you in 1020-A? [156—88] A. The

situation is the same except that these two piles (indicating) were broken over when the bulkhead gave away. Q. These few piles leaning from the street outward have broken out since from the edge of the street from the pressure of debris? A. Yes.

Q. Otherwise the piles represented in this picture were there at the time the injunction was served?

A. Yes, sir. Q. And these were the piles your witness and you have testified to were set by your company or your predecessors? A. Yes, sir. Mr.

RUSTGARD.—I offer this picture in evidence. Mr. HELLENTHAL.—Let me ask a question or two about the picture. Mr. Worthen, all these buildings shown in the photograph that has just been offered, back of the street there, are all Alaska Juneau buildings, are they not? A. As far as I know they are.

Q. That large building is their carpenter shop, isn't it? A. I don't know what they designate it as; this is where the office is now—this is a little steam-heating plant, and their office is right on this end.

Q. That is the large building, anyhow? A. It is the large sheet-iron building at the left? Q. This

building that shows over the top there is the old Chief Johnson house isn't it? A. I don't know

about that, Mr. Hellenthal; it is where the fishermen used to live when I came here. Q. Mr. Worthen,

(Testimony of H. S. Worthen.)

you know that this picture was taken this year?

A. Yes; the 14th of April. Mr. HELLEN-THAL.—No objection. (Whereupon said photograph was received in evidence and marked Worthen Company's Exhibit No. 11 and hereto attached.)

Q. (By Mr. RUSTGARD.) I show you another picture, Mr. Worthen, and ask you from what point that was taken and what it represents? A. It was taken

from a position on the float at the lower end of the boom ground looking toward the mill, showing the boom ground at the right and the same piles as the other picture shows, partially; the row of houses on the inner side of the street, and the sawmill in the distance.

Q. That row of cottages there are on the upland side? A. Yes, sir. Q. Now, there are piles

of lumber [157—89] lying alongside of the street there—is that lumber lying on this piece of ground you designate as platform? A. Yes, sir. Q. And

they are lying on the lower side of the street? A. Yes, sir. Q. The mill is the building in the background?

A. Yes, sir. Q. What time was this picture taken?

A. Taken the same day and at the same time.

Q. The 14th day of this month? A. Yes; April.

Q. Is there any difference now on the ground—has the situation changed any from the time the injunction was granted, as far as the street, buildings and pilings are concerned, and at the time this picture was taken? A. Only these same piles as shown here

as tipping out. Q. From the pressure of the debris?

A. Yes; it is the same picture as the other. Q. You

refer now to the piles in the right foreground?

(Testimony of H. S. Worthen.)

A. Yes, sir. Mr. RUSTGARD.—I offer that in evidence. Mr. HELLENTHAL.—Q. Mr. Worthen, When you say the situation in this picture hasn't changed since the time the injunction was granted, you mean as far as the street and the piles in that neighborhood are concerned? A. I understood the question to be that there was no change in the piling—it is the same now as it was then. Q. You know, of course, that the Alaska Juneau Company have done a great deal of work on the upland since then? A. Very little change on either side of the street, only that the other side is filled now. Q. They have built a mill there? A. Yes; way up on the side-hill. Q. A lot of work has been done there which is shown on some of these pictures—you know that there was a lot of work done on the hillside? A. Yes. Q. This picture don't include that hillside on which the mill is? A. I don't think so. Mr. HELLENTHAL.—No objection. (Whereupon said picture was received in evidence and marked Worthen Company's Exhibit No. 12 and hereto attached.) Q. (By Mr. RUSTGARD.) I show you another picture and ask you from what point that was taken and what part of the country here in question does it show? A. It was taken from the platform on this side of the so-called fish-house, used as a dormitory now—bunk-house—looking up towards the Alaska Juneau's tramway and mill. It shows the lower end of the same piling and [158—90] the bulkhead as shown in the other two pictures, only a different view. Q. These piles here are cut off at

(Testimony of H. S. Worthen.)

a certain level or elevation—they are the piles you testified to were cut by your company to put the caps on at the time of the injunction? A. Yes, sir; just

before the injunction. Q. When was this picture taken? A. That was taken this noon at 12 o'clock.

Mr. RUSTGARD.—I offer that in evidence. Mr.

HELLENTHAL.—No objection. (Whereupon said picture was received in evidence and marked Worthen Company's Exhibit No. 13 and hereto

attached.) Q. I show you another picture, Mr. Worthen, and ask you from what point that was taken, and what country does it represent? A. It

was taken from the street at the extreme end of the city limits looking up the hill at the Alaska Juneau tramway that they take their freight up on.

Q. That is the place on the exhibit you have marked warehouse, Alaska Juneau wharf? A. Yes, sir; right in front of the wharf. Q. And the tramway

shown in this picture is the tramway shown on those maps? A. One of the tramways—the southeasterly one—the one they use at the present time. Q. What

time was this picture taken? A. This noon. Mr.

RUSTGARD.—I offer this picture in evidence Mr.

HELLENTHAL.—I don't know that it is material; this situation isn't anywhere near the property in controversy; I have no other objection to it if counsel thinks it proves anything. Mr. RUSTGARD.—It is

part of the ground gone over in the testimony—described in the testimony of Mr. Bradley; instead of having the witness testify to what it looks like I prefer to offer photographs. Mr. HELLEN-

(Testimony of H. S. Worthen.)

THAL.—If counsel thinks it is material, I have no objection. (Whereupon said photograph was received in evidence and marked Worthen Company's Exhibit No. 14.) Q. I show you another picture, Mr. Worthen, and ask you from what point it was taken? A. This was taken from practically the same point as the last one except the camera was swung to the right looking towards the southeast. Q. Does that represent a continuation of the country shown in exhibit No. 14—the last picture you looked at, and the country to the south from the Alaska Juneau wharf? A. Southeast; yes, sir. Q. Down the channel? A. Yes. Q. Those cabins shown in this [159—91] picture to the extreme right—are they cabins on the shore line above mean high tide? A. Yes. Q. And below the road? A. There are several below the road and one above—I think there is sort of a little wickey-up back of that cabin. Q. That picture was taken to-day at noon? A. Yes, sir. Mr. RUSTGARD.—I offer that in evidence. Mr. HELLENTHAL.—Q. Mr. Worthen, are you familiar with the cabins shown on this picture? A. In a way—that is, I have been past them. Q. You know this second one shown on this picture belongs to Mr. Bowdie, don't you? A. I do not. Q. You don't mean that that is the property of the Alaska Juneau? A. I don't know—I think, however, that I have heard that story, but I don't know anything about it. Mr. HELLENTHAL.—All right—no objection. (Whereupon said photograph was received in evidence and marked Worthen

(Testimony of H. S. Worthen.)

Lumber Company's Exhibit No. 15.) Q. (By Mr. RUSTGARD.) I will ask you, Mr. Worthen, if the Alaska Juneau Company, or others, should build a wharf out to the deep water—that is, as far as a wharf can practicably be built, over the ground marked by Mr. Bradley on the Alaska Juneau Exhibit “Y” as “Proposed Wharf,” immediately southeast of what is designated as the Jorgenson thousand-foot reservation, what effect, if any, would that have upon your sawmill property? A. The sawmill property would be rendered valueless—we could not use it as a sawmill. Q. It would be out of the question—using the sawmill as a sawmill? A. Yes, sir. Q. To operate it as such it is absolutely essential to get your log booms in from the southeast along the shore? A. Yes, and we have to have space along the shore beyond the mill to hold them. Q. So if a wharf should be built as explained by Mr. Bradley in his testimony, it would mean the closing down of your sawmill property? A. As a sawmill it would. Q. Since you came to Juneau, Mr. Worthen, has Franklin Street, along where it is shown on the waterfront in these maps introduced—has it been a street of general use in the city? A. Yes. Q. Is it traveled much or little as compared with the other general streets in the city? A. Why, I think there is quite a heavy travel over it; of course all the Sheep Creek—Thane—travel goes over it; possibly not so much as Front Street proper—as much as any other than Front Street; of course the heaviest traffic I would consider on any street would be from the city

(Testimony of H. S. Worthen.)

dock to the Pacific [160—92] Coast dock probably. Q. That is about the heart of the city?

A. About that. Q. That street has been generally used as such by the Alaska Juneau during these years? A. Yes, sir; used as a public street since I have been in town.

Cross-examination by Mr. JACK HELLENTHAL.

Q. When did you come here, Mr. Worthen? A. I took charge of the mill in February, 1913. Q. During what period has the street been open—that is, what I am trying to get at? A. The first I ever observed that street was in February, 1913. Q. And the testimony that you are giving with reference to the street was since that time? A. Yes, sir.

Q. The street had already been built when you came here? A. Yes. Q. Now, Mr. Worthen, do you

mean to tell this Court that you could not operate your sawmill if that wharf was built there? A. No,

sir; not as a practical proposition we could not. Q. You could not put your logs in that boom in any

other way than starting a little above Taku and shooting them down in one straight line? A. I

wouldn't make that statement. Q. The only way you can operate your sawmill is to have the boom so

situated that you can—A. The only way we can operate successfully is to have the boom along the

beach. Q. The wharf wouldn't cover your entire boom? A. It would cover a good deal of it.

Q. How many feet would be still left to you? A. I think about 380 feet, approximately. The

COURT.—It would leave you 380 feet which way?

(Testimony of H. S. Worthen.)

A. Why, from this line—I think it is about 380 feet from there (indicating on map). The COURT.—How about the extension to deep water. A. Well, it doesn't show on this map; the dolphins are along here (indicating); there seems to be sort of a ridge on the bottom of the ocean there (indicating) and going out a little further it drops off very abrupt there. Q. You would have a boom 380 feet long left from the slip extending down channel to the end of the Jorgenson thousand foot reservation marked on exhibit "Y"? A. Approximately that. Q. And you you would have some boom between the slip and the mill? A. No; there isn't any boom between the slip [161—93] and the mill. Q. It is a matter of 20 feet between the slip and the mill, isn't it? A. But you cannot hold logs in there—it sn't a practical way; you couldn't get them by the slip except you take them this way (indicating). Q. You say the reason it would render your mill valueless is because your mill boom wouldn't be large enough? A. The average boom which comes in reaches from here down to here (indicating); at times we have to put them over here (indicating). Q. At times you have to encroach on the Alaska Juneau property with your booms? A. We had some booms in here last year that we broke up on the outside because we couldn't get in as the boom ground is now.

The Worthen Lumber Mills Rests.

[Testimony of P. R. Bradley, for Plaintiff (in Surrebuttal).]

SURREBUTTAL.

P. R. BRADLEY, a witness, recalled on behalf of the Alaska Juneau Gold Mining Company, having been previously sworn, testified in surrebuttal as follows:

Direct Examination by Mr. JACK HELLENTHAL.

Q. Mr. Bradley, you are familiar with the situation of what has been termed here in this case Franklin Street, referring to the planked road extending over the tide-flat in front of the A millsite?

A. Yes, sir. Q. Does that road as constructed and maintained by the city in any way obstruct or interfere with your access to deep water from the upland of the A millsite, or adjoining properties?

A. Not in any way at all. Q. If it has any effect, it facilitates it?

A. Yes. Q. If Mr. Worthen's platform were constructed there and lumber piled on it—used by him for private purposes—how could that affect your access?

A. It would interfere with our access.

Q. Cut it off, wouldn't it?

A. Yes. Q. Referring to one of these photographs offered in evidence—you know those houses situated below the wharf—you are familiar with those—referring to the photograph I now hand you (Worthen Company's Exhibit 15), which is a photograph showing some houses along the Government road, taken to the right of the Alaska Juneau wharf; the picture shows one cabin on the upland side of the street and a couple of houses on the lower side of the street; I will ask you to look

(Testimony of P. R. Bradley.)

at that lower [162—94] house there, and property in the vicinity of that house, and state who that belongs to? A. That belongs to Henry Bowdie,

locally known as "Dutch Bowdie." Q. Doesn't belong to the Alaska Juneau Company? A. No.

Q. The waterfront in that locality belongs to Mr. Bowdie? A. Yes, sir. Q. And you have no right there except the right he has granted you? A. Yes.

Q. And he has granted you no right to build a wharf there? A. No. Q. And that property lies immediately to the south of the Alaska Juneau wharf?

A. To the south a short distance. Q. There may be a few feet between that and the Alaska Juneau wharf? A. Yes. Q. Now, referring to the landslide above the Alaska Juneau wharf and the loose earth shown on that hillside—is there any part of that mountain side which, in its natural state, before you have cleaned it off and removed the dirt, is not subject to landslide? Mr. RUSTGARD.—I object to that as not proper rebuttal. Mr. HELLENTHAL.—It was all brought out by Mr. Rustgard. Mr. RUSTGARD.—That is opening up an entirely new subject that hasn't been gone into. Mr. HELLENTHAL.—The purpose of these photographs is for that purpose—I want to explain those photographs. The COURT.—The objection will be overruled. A. In my opinion, the fact that there are landslides there shows that such things are possible, and landslides are simply due to the weathering of the rock—the atmospheric conditions—the alternate freezing and thawing in the spring of the year, and I see no reason why that

(Testimony of P. R. Bradley.)

should not affect one part of the mountain as well as another. Q. You know that landslides have occurred at different points along the whole mountain side there? A. Yes. Q. What have you done and what are you doing to prevent a reoccurrence of land slides? Mr. RUSTGARD.—I object to that as immaterial, irrelevant and improper re-rebuttal. Mr. HELLENTHAL.—I want to ask one question to explain these pictures. The COURT.—Submit to him the photograph you want him to explain and let him explain it—I have no objection to that. Q. Calling your attention to a photograph showing the Alaska Juneau tramway running up the hill and showing loose, sliding material in the picture, I will ask you what the company is doing and how it is preventing [163—95] the landslides from reaching the structures that are being constructed? (Referring to Worthen Company's Exhibit No. 14.) Mr. RUSTGARD.—I object to that as immaterial, irrelevant, and improper redirect or re-rebuttal. The COURT.—He may answer. A. Well, at the present time the precautions that we are taking against landslides is simply to keep out of the path and to remove any loose material while we are in control of the situation, before it gets away from us and moves of its own accord. Q. Below what level or contour do the landslides come from, Mr. Bradley? Mr. RUSTGARD.—I object to that as immaterial, irrelevant and not proper redirect or re-rebuttal. The COURT.—It seems to me, Mr. Hellenthal, that you have gone into this once. Mr. HELLENTHAL.—

(Testimony of P. R. Bradley.)

No; I haven't gone into that; I don't think. It is a matter which needs a little explanation—these pictures were taken for the purpose of putting in something that looks ugly and I want to explain it. I will withdraw that question for a moment. Q. I call your attention to another picture showing the Alaska Juneau mill and a piece of ground cleared off there at the side of the mill—what has been done on that ground—has that been cleaned off? A. That has been cleaned off for two reasons—one reason is to get a solid foundation for heavy machinery; another reason is, as I have just stated, to control the situation while we could—get the loose stuff away before it comes down on us. Q. Why do you do that—to obviate the danger of landslides? Mr. RUSTGARD.—I object to that as immaterial, irrelevant and improper redirect. The COURT.—I will permit that question, but, Mr. Hellenthal, I think you have gone far enough. A. To remove the danger from rock and landslides. Q. Calling your attention to another photograph that shows the Alaska Juneau mill and some of the ground that has been cleaned off—Mr. Worthen, I think, has been trying to locate the site for the power-house as being near an old tree there; does that show the correct position, or is the position further over, below it? Look at that picture and then look at the map and see if you can straighten it out. A. I cannot say where the tree comes on this drawing, but the power-house site is below the tree. Q. It is below the tree? A. Yes. Mr. HELLENTHAL.—That is all. Mr. RUST-

GARD.—No further questions. [164—96] Mr. HELLENTHAL.—That is, your Honor, our case. The COURT.—The evidence is closed.

[Findings of Fact, Requested by Defendant.]

Thereupon defendant requested the Court to find the following facts, to wit:

1. That at the time of the commencement of this action, for several years prior thereto, defendant was and ever since has been in sole and exclusive possession and occupancy of that certain [165—97] strip of ground below mean high tide, on the northeasterly shore of Gastineau Channel, and adjoining the seaward side of Franklin Street, in the town of Juneau, Alaska; said premises being a strip of ground sixteen (16) feet wide and four hundred (400) feet long, extending from a point on the southwesterly side of said Franklin Street 1555.8 feet in a southeasterly direction from Corner No. 1 of the townsite of Juneau; thence in a southeasterly direction along and adjoining the southwesterly side of Franklin Street, a distance of 400 feet.

2. That Franklin Street, in the town of Juneau, Alaska, is public thoroughfare constructed, established, and maintained as such by the municipal corporation of the town of Juneau, Alaska, and that in its entire width, which is twenty (20) feet, it is below the line of mean high tide of Gastineau Channel, for the length of four hundred (400) feet immediately above the premises or strip of ground heretofore described and in the possession and occupancy of defendant.

3. That the premises above line of mean high tide,

directly across the said street or thoroughfare, known as Franklin Street, from the aforesaid premises occupied by and in the possession of defendant, are held, claimed and occupied by plaintiff corporation by means of certain unpatented millsite locations for which said plaintiff corporation is at present applying for Patent from the United States.

4. That immediately below and to the seaward of the said premises, heretofore described as occupied by and in the possession of defendant, are the navigable waters of Gastineau Channel, which latter, for several years last past has been and is now being used by the defendant for towing and floating saw logs to a certain sawmill plant owned and operated by defendant on the premises immediately to the northwest of the said strip of ground sixteen feet by four hundred feet above described. [166—98]

5. That in case plaintiff should erect a wharf over the navigable waters of Gastineau Channel, in front of and to the seaward of said strip of ground sixteen (16) feet by four hundred (400) feet above described, to the deep waters of said channel, where ocean-going vessels may land and discharge cargoes, the said sawmill plant belonging to defendant on the adjoining premises will be greatly depreciated in value and rendered useless for sawmill purposes, by reason of the obstruction of the natural channel for the towing of logs to said sawmill plant, and the defendant will thereby be irreparably injured in its rights.

6. That plaintiff is the owner of more than 8,000 feet or waterfront on the northeasterly shore of Gastineau Channel, commencing at approximately

1000 feet to the northwest of the premises here in question, and extending approximately 7000 feet along line of mean high tide of Gastineau Channel about 7000 feet, in a southeasterly direction.

7. That plaintiff intends to wash and sluice debris and tailings into the waters of Gastineau Channel, on the seaward side of said Franklin Street, in the town of Juneau, immediately underneath and to the seaward of the said tract sixteen (16) feet by four hundred (400) feet, occupied by defendant as aforesaid, and to that extent obstruct navigation in front of said premises; and also desires to erect a wharf in front of said premises and over the navigable waters of said Gastineau Channel to deep water where ocean-going vessels can discharge cargo; but that the said plaintiff corporation has received no permit from the Secretary of War to deposit such debris or tailings into the said waters of Gastineau Channel, or to erect any such wharf over said waters.

That each of said proposed findings the Court refused, and to each of said refusals defendant duly excepted.

[Conclusions of Law, Requested by Defendant.]

Thereupon defendant requested the Court to file conclusions of law as follows, to wit:

1. That plaintiff, by reason of being the owner of millsite [167—99] locations has no littoral or riparian right of access to navigable water.

2. That plaintiff, by reason of being the upland owner, has no riparian right or littoral right to any of the shore of Gastineau Channel below Franklin Street, at the point where the said Franklin Street

runs on or below the line of mean high tide.

3. That plaintiff corporation has no right separate and apart from the public right to wharf out from the lower side of Franklin Street opposite the premises in controversy in this cause.

4. That plaintiff has no authority to deposit debris or erect a wharf in or over the waters of Gastineau Channel below mean high tide.

5. That plaintiff has not suffered, nor is suffering, nor will suffer any special and peculiar injury different from the injury suffered or sustained by the public generally, by reason of the defendant's possession and occupancy of the strip of ground sixteen (16) feet wide by four hundred (400) feet long, adjoining the lower and seaward side of Franklin Street in front of the premises here in controversy.

6. That plaintiff corporation is not entitled to the relief prayed for in the complaint nor any relief at all.

Each of which conclusions was refused by the Court, and to each of such refusals defendant duly excepted.

[Exceptions to Certain Findings and to Conclusions of Law, etc.]

Defendant also duly excepted to each of the third and fourth findings of facts filed herein and to the following portion of the Court's finding No. 2, to wit: "That on the 23d day of August, 1911, plaintiff became and at all times since has been the owner and in possession and entitled to the possession of those two mining claims situated on Gastineau Channel, a navigable arm of the North Pacific Ocean, near the city

of Juneau, known as the Abe Lincoln and General Grant. Said claims were and are the upland upon which abuts the tide-land involved in this litigation.”

[168—100]

Defendant also excepted to that portion of the Court’s finding No. 2, reading as follows, to wit: “That said tide-land is shoal water lying immediately between said upland and the navigable waters of Gastineau Channel.”

Defendant also excepted to that portion of the Court’s finding No. 9, reading as follows, to wit: “That the plaintiff did not consent to or give the city any right whatever to construct said road, but that the same was constructed without consulting the plaintiff; that the construction and maintenance of said street does not and never did interfere with any of the plaintiff’s rights, and that it is so constructed that plaintiff can wharf out and have access to deep water notwithstanding said plank road.”

Defendant also excepted to each of the Court’s conclusions of law.

Defendant also excepted to the decree entered herein. [169—101]

Worthen L. M. Exhibit No. 3.

(Received in evidence Apr. 15, 1915.)

THIS DEED, made this 24th day of March, 1913, between ALASKA SUPPLY COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Washington, and doing business as a corporation in the District of Alaska, the party of the first part, and WORTHEN LUMBER MILLS, a corporation organized and existing

under and by virtue of the laws of the State of Washington and doing business as a corporation in the District of Alaska, the party of the second part;

WITNESSETH: That the said party of the first part, for and in consideration of the sum of twenty-five thousand dollars (\$25,000) to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and by these presents does grant, bargain, sell and convey unto the said party of the second part and to its assigns and successors in interest the following described property situate, lying and being in the town of Juneau, Alaska, to-wit:

Jorgenson's saw-mill and blacksmith shop site. Commencing at the northwest corner of lot which is situated in the northeast side of Franklin St. Extension, whence corner No. 1 (N. E. Corner) of millsite property bears north $34^{\circ} 26'$ west 215 ft. distant; thence running north $56^{\circ} 14'$ east 24 ft. distant to the northeast corner of lot; thence south $31^{\circ} 30'$ east 22 ft. distant to the southeast corner of lot; thence south $56^{\circ} 14'$ west 24 feet distant to the southwest corner of lot; thence north $31^{\circ} 30'$ west 22 ft. distant to the northwest corner of lot and the place of beginning.

Boarding house site. Commencing at the northwest corner of lot which is situated on the northeast side of Franklin St. Extension, whence the northeast corner of millsite property bears north $32^{\circ} 57'$ west 356.4 ft. distant; thence running north $58^{\circ} 30'$ east 31 ft. distant to the northeast corner of the lot; thence south $31^{\circ} 30'$ east 41.9 ft, distant to the southeast corner of lot; thence south $38^{\circ} 30'$ west 30 ft. distant

to the southwest corner of the lot; thence along the northeast side of Franklin St. Extension 41.9 ft. distant to the northwest corner of lot and the place of beginning. [170]

Jorgenson mill and wharf property. Commencing at the northeast corner of millsite property identical with corner No. 4 of Jorgenson property on the southeast end line of oil house extended and on the northeast side of Franklin St. Extension, whence corner No. 1 of the townsite of Juneau bears north $42^{\circ} 50'$ west 701.30 ft. distant; thence south $27^{\circ} 13'$ west 55.20 ft. to a point 4 feet southwest of the southwest corner of said oil house; thence north $63^{\circ} 37'$ west 26.6 feet to a point in front of said oil house; thence south $44^{\circ} 02'$ west 121.7 feet to the northwest corner of mill property and on the southwest side of Shattuck's wharf; thence south $33^{\circ} 31'$ east 60 feet along mill property; thence south $44^{\circ} 02'$ west to the deep and navigable water of Gastineau Channel; and

Commencing at the northeast corner of millsite property and running thence south $23^{\circ} 58'$ east 71.20 ft. to the northeast corner of mill dry house; thence along the present southwest side of Franklin St. south $31^{\circ} 20'$ east 328 ft. to a point on Franklin St.; thence south $31^{\circ} 56'$ east 468 ft. along the southwest side of Franklin St. to a point on Franklin St.; thence south $39^{\circ} 03'$ east 368.6 ft. along the southwest side of Franklin St. to the southeast corner of wharf property; thence south $50^{\circ} 57'$ west to the deep and navigable water of Gastineau Channel;

All courses described from the true meridian. Magnetic variation $32^{\circ} 00'$ east of north.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, its assigns and successors in interest forever.

IN WITNESS WHEREOF the said Alaska Supply Company has caused this instrument to be signed by its president and its corporate seal to be thereto affixed and attested by its secretary, all on the day first above written.

[Corporate Seal.]

ALASKA SUPPLY COMPANY,

By H. SHATTUCK,

Its President.

Attest: J. H. KING,

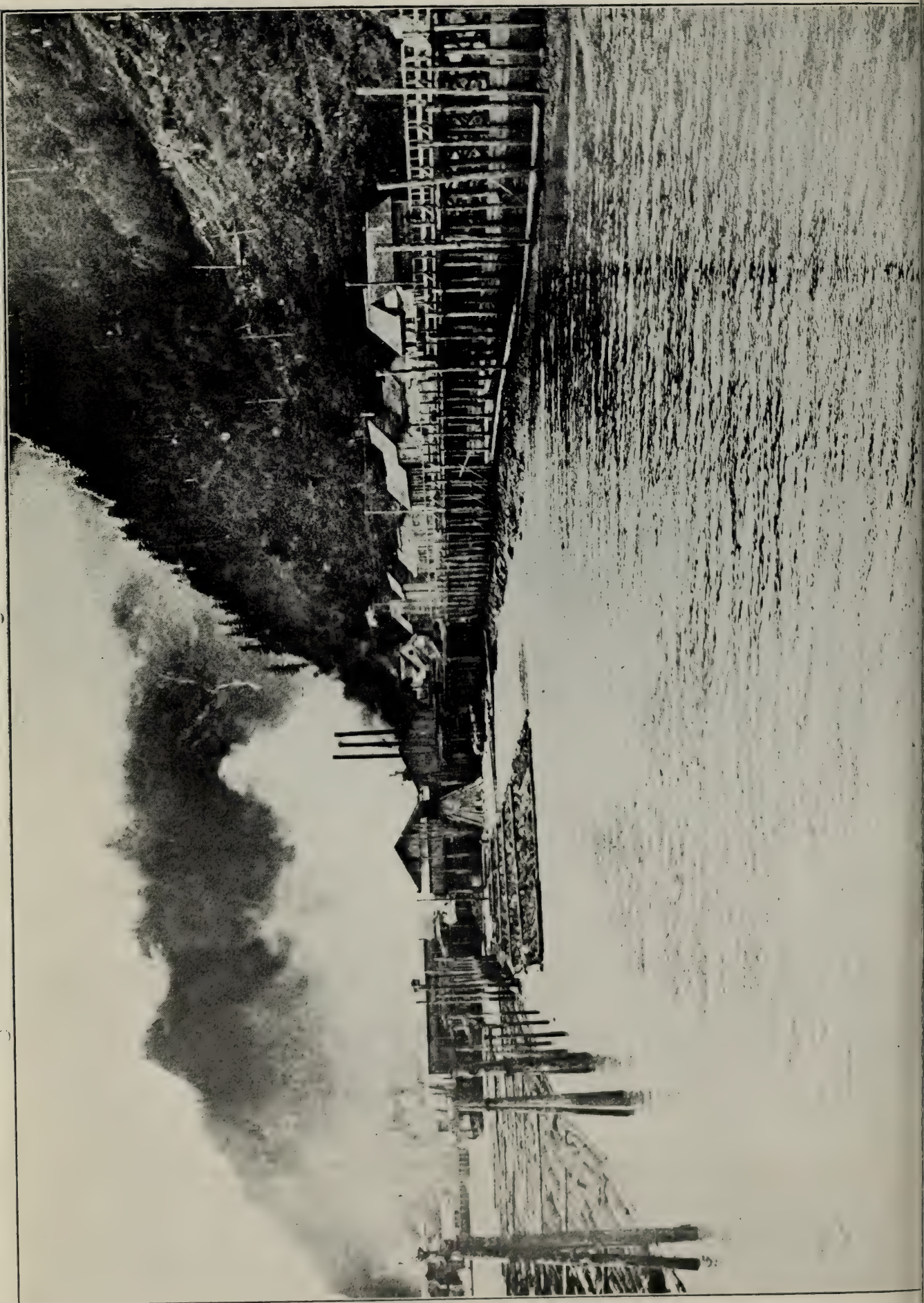
Its Secretary.

Signed, sealed and delivered in presence of:

W. S. BAYLESS.

M. M. CHARM. [171]

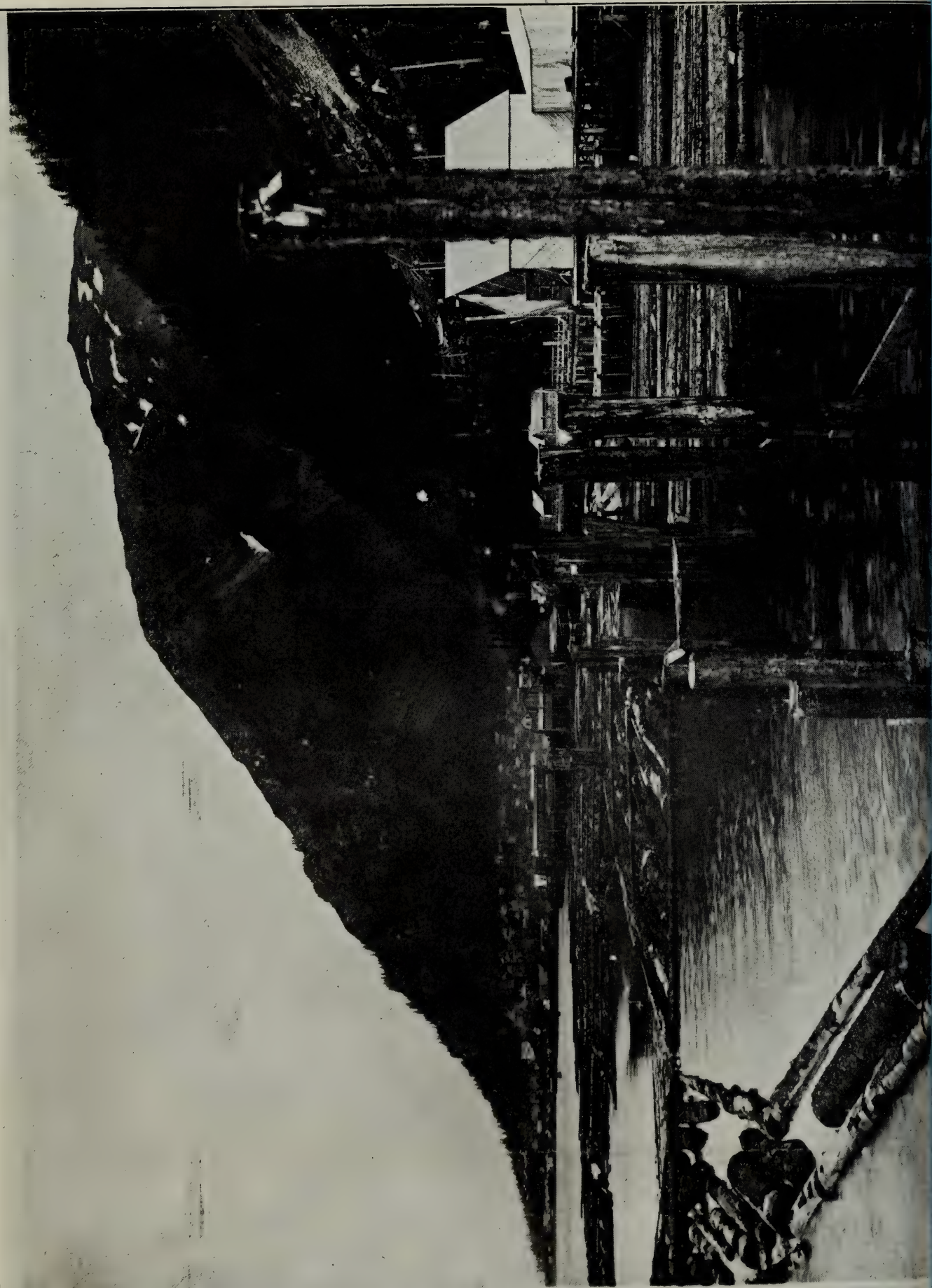
[Worthen Lumber Mills Exhibit No. 4—
Photograph.]

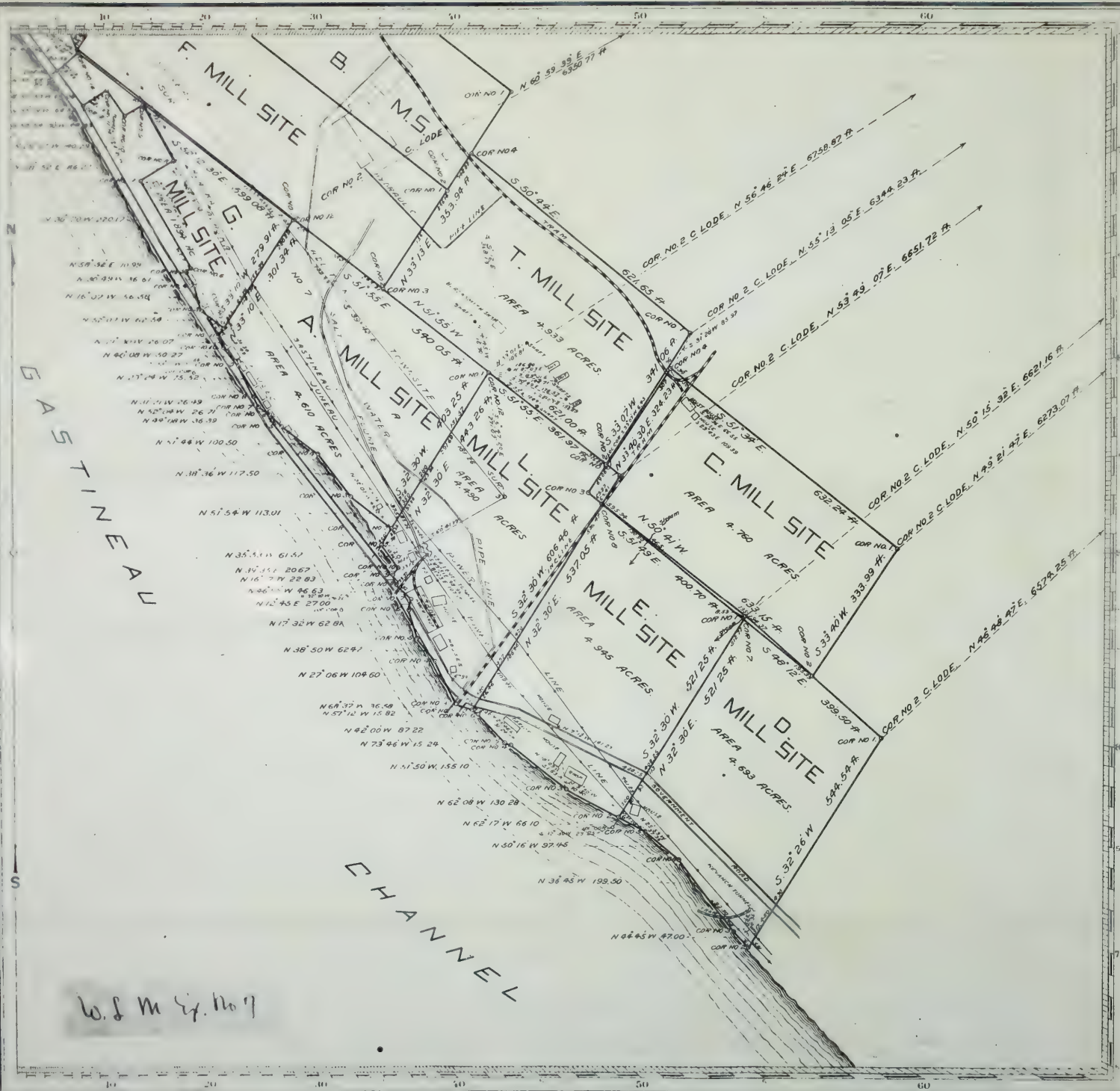


[Worthen Lumber Mills Exhibit No. 5—
Photograph.]



[Worthen Lumber Mills Exhibit No. 6—
Photograph.]





Claim located

19

Mineral Survey No. 982 A and B

Juneau

Lot No.

Land District

PLAT

OF THE CLAIM OF

KNOWN AS THE

IN _____ MINING DISTRICT,
COUNTY _____Containing an Area of _____ Acres.
Scale of _____ Feet to the inch.

SURVEYED _____ BY _____

U.S. Deputy Mineral Surveyor

The Original Field Notes of the Survey of the Mining Claim of
known as the _____

from which this plat has been made under my direction, have been examined and approved, and are on file in this Office, and I hereby certify that they furnish such an accurate description of said Mining Claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof. I further certify that Five Hundred Dollars worth of labor has been expended or improvements made upon said Mining Claim by claimant _____ or _____ grantors and that said improvements consist of _____

that the location of said improvements is correctly shown upon this plat, and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

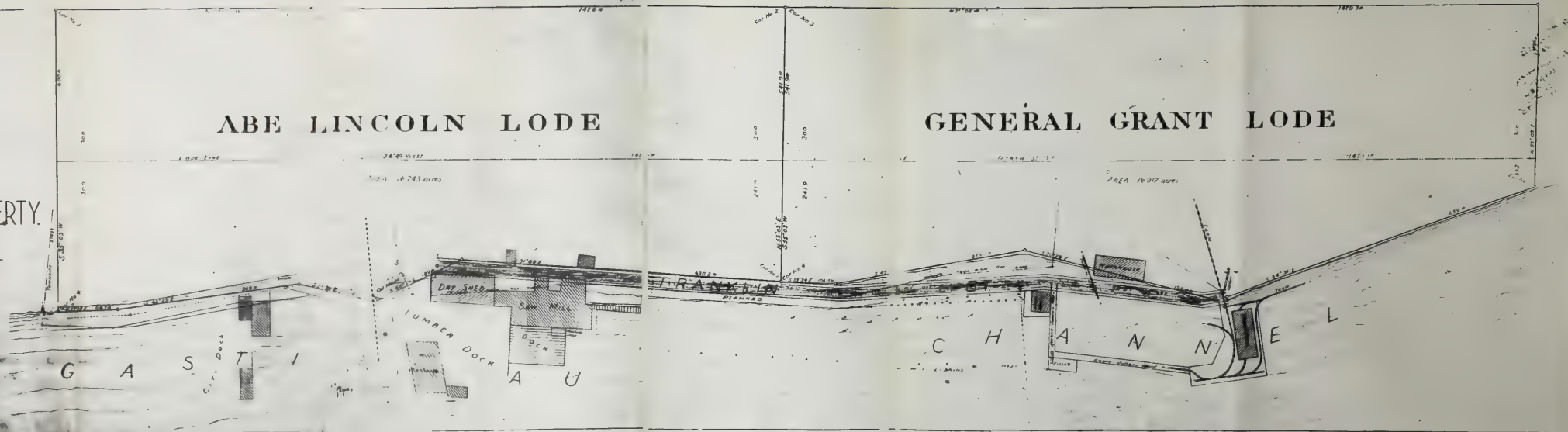
And I further certify that this is a correct plat of said Mining Claim made in conformity with said original field notes of the survey thereof, and the same is hereby approved.

U.S. Surveyor General's Office

U.S. Surveyor General for

MAP OF
 WORTHEN LUMBER MILLS PROPERTY.
 JUNEAU, ALASKA.
 — 1914. —

Scale 1 inch = 500 feet



Worthen L. M. Exhibit No. 9.

(Received in evidence Apr. 17, 1915.)

ORDINANCE NO. 87.

AN ORDINANCE PROVIDING FOR THE EXTENSION, LAYING OUT AND OPENING OF FRANKLIN STREET IN THE CITY OF JUNEAU.

The City Council of the City of Juneau doth ordain as follows:

Section 1. That Franklin Street, in the City of Juneau, be and the same is hereby opened and laid out from the point where the same intersects with Front Street in the said City of Juneau to Corner No. 1 of the corporate survey of the City of Juneau; that said Franklin Street as so laid out and opened is described as follows:

Commencing at Corner No. 6 Survey No. 7; thence N. 57 deg. 52 min. E. 17.0 feet to point on easterly line of Franklin Street; thence S. 44 deg. 00 min. E. 46.6 feet to point on easterly line of Franklin Street; thence S. 37 deg. 20 min. E. 298.11 feet to point on easterly line of Franklin Street; thence S. 56 deg. 37 min. E. 150.0 feet to point on easterly line of Franklin Street; thence S. 32 deg. 20 min. E. 449.36 feet to point on easterly line of Franklin Street, whence Cor. No. 2 U. S. S. No. 7 bears S. 57 deg. 52 min. E. 15.0 feet distant; thence S. 38 deg. 06 min. E. 425.5 feet to Corner A; thence S. 47 deg. 07 min. E. 644.8 feet to Corner B; thence S. 57 deg. 52 min. W. 10.0 feet to point thence S. 35 deg. 23 min. E. 233.5 feet to point; thence S. 33 deg. 04 min. E. 548.5 feet

to Corner B; thence S. 50 deg. 08 min. E. 307.0 feet to Corner F; thence S. 38 deg. 10 min. E. 172.5 feet to Corner G; thence S. 23 deg. 08 min. #. 303.0 feet to Corner H; identical with corner No. 1 of the [177] corporate survey of the City of Juneau; thence S. 57 deg. 52 min. W. 20.0 feet to point on shore of Gastineau Channel; thence N. 23 deg. 08 min. W. 303.0 feet to point on shore of Gastineau Channel; thence N. 38 Deg. 10 min, W. 172.5 feet to point on shore of Gastineau Chanel; thence N. 50 deg. 08 min. W. 307.0 feet to point on shore of Gastineau Channel; thence N. 33 deg. 04 min. W. 548.5 feet to Corner D on shore of Gastineau Channel; thence N. 35 deg. 23 min. W. 233.5 feet to Corner C on shore of Gastineau Channel; thence S. 57 deg. 52 min. W. 10.0 feet to point on Gastineau Channel; thence N. 47 deg. 07 min. W. 644.08 feet to point of Gastineau Channel; whence Cor. A. bears N. 57 deg. 52 min. E. 40.0 feet distant; thence N. 38 deg. 06 min. W. 425.5 feet to point whence Cor. No. 2 U. S. No. 7 bears N. 57 deg. 52 min. E. 25.0 feet distant; thence N. 32 deg. 20 min. W. 449.36 feet to point on shore of Gastineau Channel; whence Corner No. 4 U. S. S. No. 7 bears N. 57 deg. 52 min. E. 35.0 feet distant; thence S. 57 deg. 52 min. W. 10 feet to point on shore line of Gastineau Channel; thence N. 26 deg. 37 min. E. 150.0 feet to point on shore line of Gastineau Channel, whence Corner No. 5 U. S. S. No. 7 bears N. 57 deg. 52 min. E. 45.0 feet distant; thence N. 37 deg. 20 min. W. 298.11 feet to point on shore line of Gastineau Channel; thence N. 44 deg. 00 min. E. 28.8 feet to intersection of Front

Street with Franklin Street; thence N. 81 deg. 3 min. W. 9.4 feet to a point on Front Street, established by Elias Rund in April 1906; thence N. 40 deg. 39 min. E. 38.19 feet to Corner No. 6 U. S. S. No. 7, the place of beginning.

Section 2. All Ordinances and parts of Ordinances in conflict with this ordinance are hereby repealed to the extent of such conflict. [178]

Section 3. This Ordinance shall be published in the Record-Miner, a newspaper published in the City of Juneau, on the following named day, to wit: July 24, 1907, and shall take effect and be in force from and after the date of its passage.

Passed by the Common Council of the City of Juneau this 19th day of July, A. D. 1907.

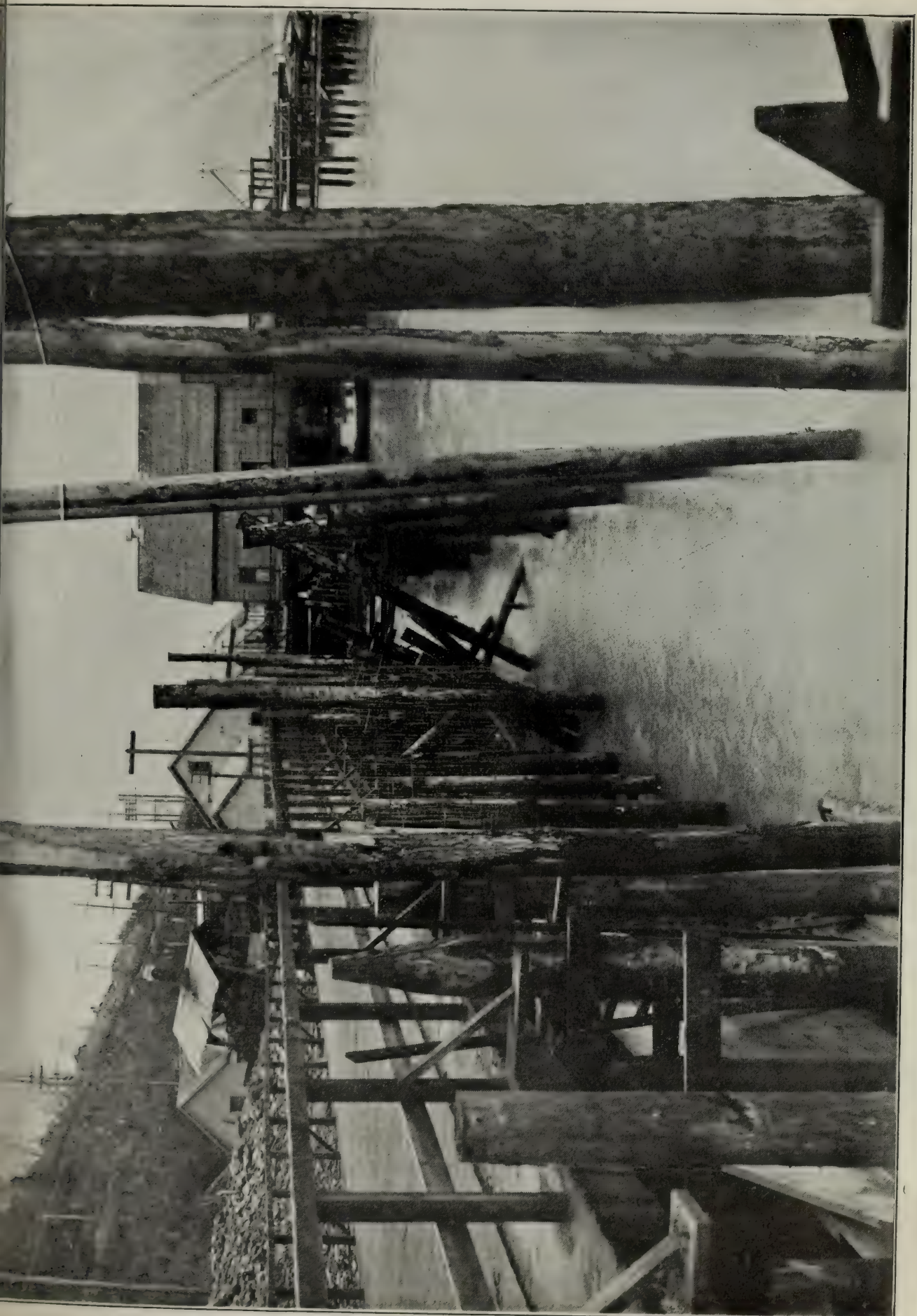
E. R. JAEGER,

President pro tem of the Town Council of the City of Juneau and Ex-officio Mayor of the City of Juneau.

[Seal] Attest: NATHANAEL GREENE,
City Clerk and clerk of the Town Council.

Copied from the "Daily Record-Miner" of July 24, 1907. [179]

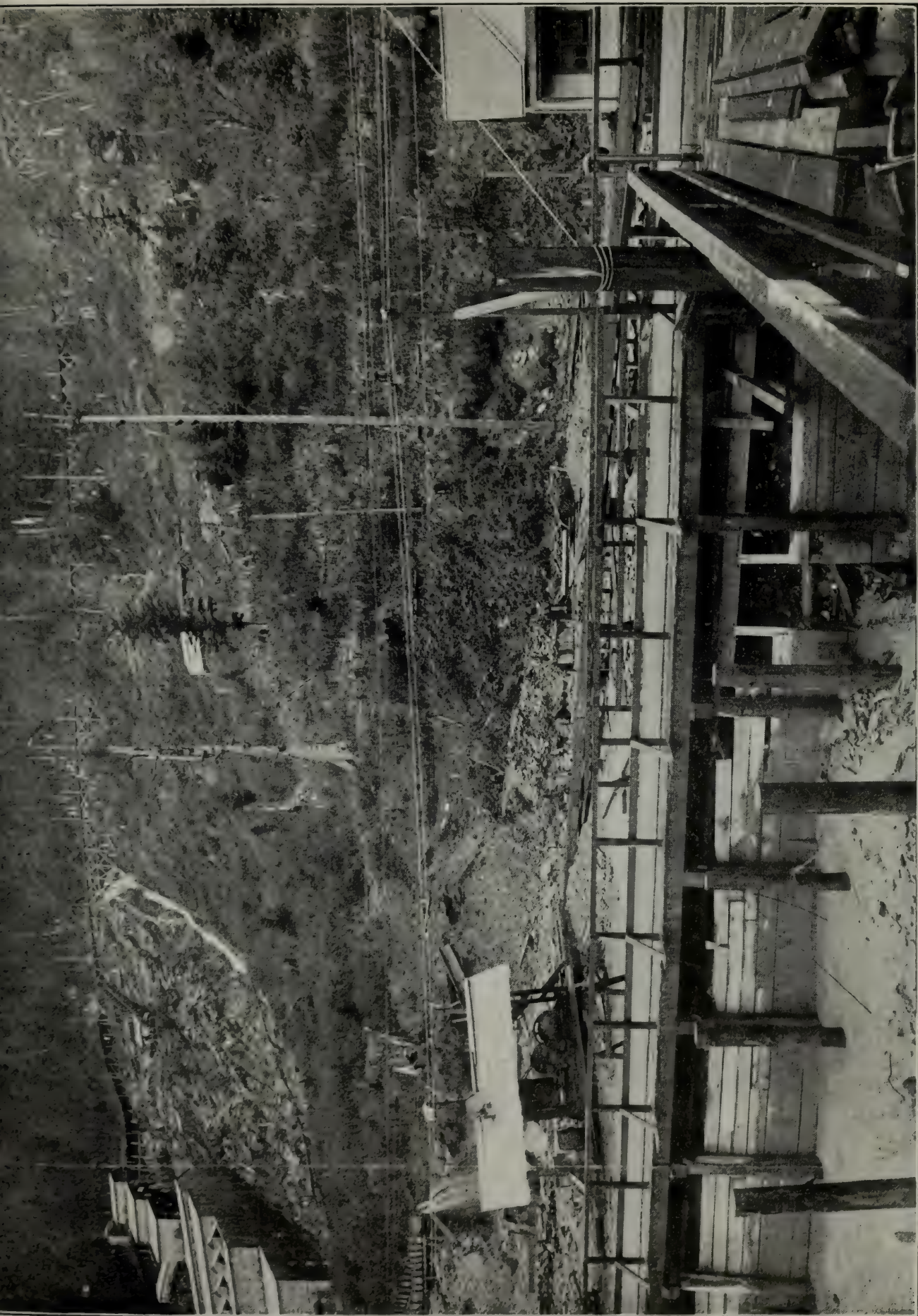
[Worthen Lumber Mills Exhibit No. 11—
Photograph.]



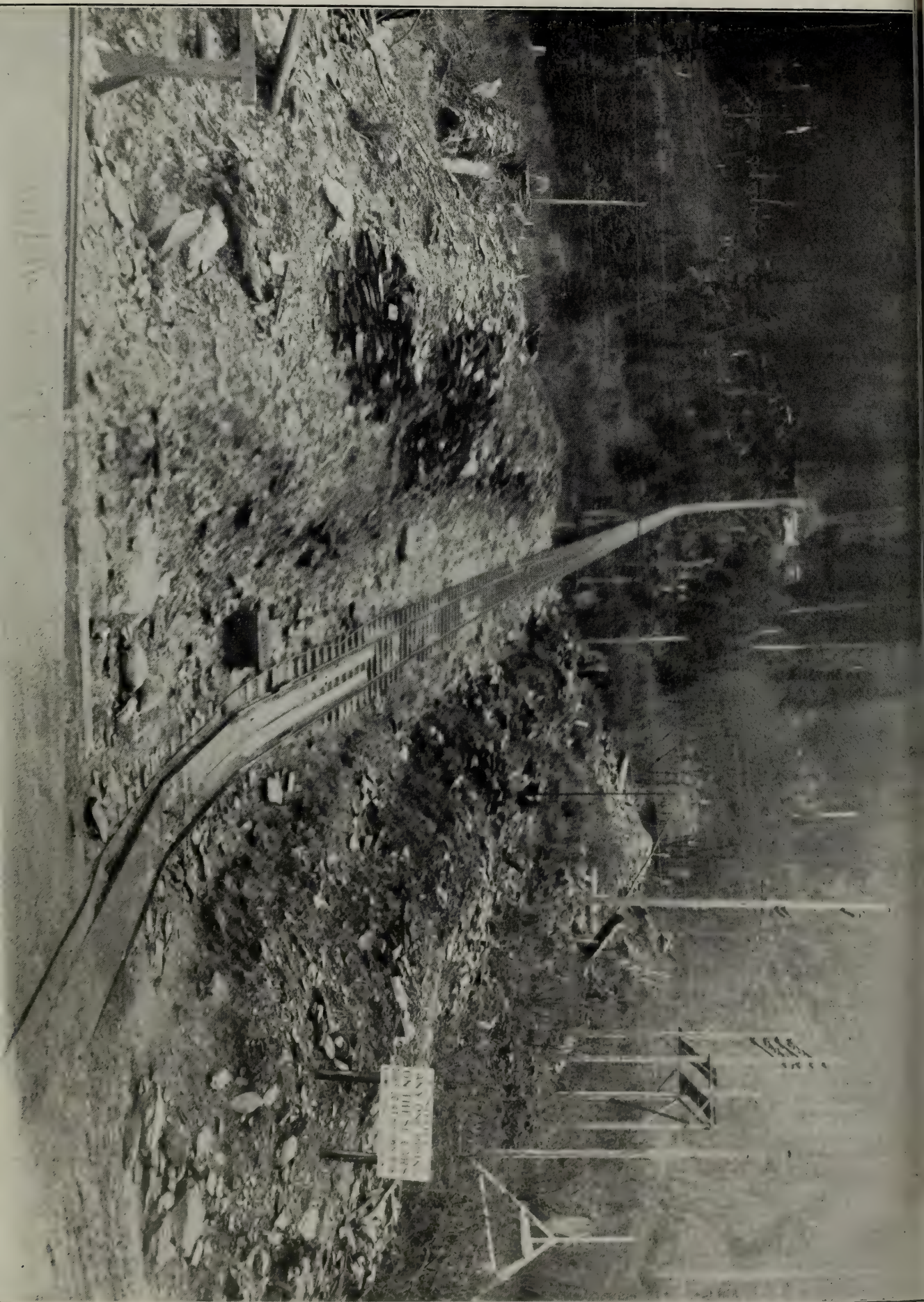
[Worthen Lumber Mills Exhibit No. 12—
Photograph.]



[Worthen Lumber Mills Exhibit No 13—
Photograph.]



[Worthen Lumber Mills Exhibit No. 14—
Photograph.]



[**Worthen Lumber Mills Exhibit No. 15—**
Photograph.]



Alaska Juneau Company's Exhibit "T."

(Received in evidence, Apr. 16, 1915.)

District of Alaska,

Juneau,—ss.

The within instrument was filed for record at 1 o'clock P .M. July 26, 1911, and duly recorded in Book 11 of Placers on Page 1 of the records of said District. G. C. Winn, District.

NOTICE OF LOCATION.

Notice is hereby given that the undersigned, having complied with the requirements of Chapter Six of Title thirty-two of the Revised Statutes of the United States, and the local customs, laws and regulations, has located an area of five acres for the "A" millsite, situated in the Harris Mining District, District of Alaska and described as follows: Beginning at Cor. #1 identical with Cor. #4 of the "L" Millsite, thence S. 33 deg. 15' W. 403 feet to Cor. #2, thence N. 53 deg. W. 540 feet to Cor. #3, thence N. 33 deg. 15' E. 403 feet to Cor. #4, thence S. 52 deg. E. 540 feet to Cor. #1 the place of beginning.

J. Z. BAYLESS,

Locator.

July 16, 1911, Located.

Attest, W. R. LINDSAY.

United States of America,

Territory of Alaska,

Juneau Precinct,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original records as taken

from Book 11 Placers on page 1, of the records of Juneau Recording Precinct, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

[Commissioner's Seal.]

JOHN B. MARSHALL,
Commissioner & Ex-Off. Dist. Recorder. [186]

Alaska Juneau Company's Exhibit "V."

(Received in evidence, Apr. 16, 1915.)

THIS INDENTURE, made this 22nd day of July in the year of our Lord one thousand nine hundred and eleven, Between J. Z. Bayless the party of the first part, and the Alaska Juneau Gold Mining Company the party of the second part:

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One 00/100 (\$1.00) Dollars lawful money of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged does by these presents remise, release and forever quit-claim unto the said party of the second part, and to its successors and assigns, the following described tract, lot or parcel of land, situated, lying and being in Harris Mining District, District of Alaska, particularly bounded and described as follows, to wit:

Known as the "A" millsite, lying on the shore of Gastineau Channel, about one half mile south east of the City of Juneau, and further described as follows:

Beginning at Cor. #1, identical with Cor. #4 of the "L" millsite, thence S. 33 deg. 15' W. 493 feet to

Cor. #2, thence N. 52 deg. W. 540 feet to Cor. #3, thence N. 33 deg. 15' E. 403 feet to Cor. #4, thence S. 52 Deg. E. 540 feet to Cor. #1, the place of beginning.

Together with and all singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. Z. BAYLESS. (Seal)

Signed, Sealed and Delivered in presence of

C. W. RUSSEL.

NEAL C. HAWLEY. [187]

District of Alaska, U. S. A.,—ss.

THIS IS TO CERTIFY, that on this 22nd day of July, A. D., 1911, before me, James Christoe, Notary Public in and for the District of Alaska duly commissioned and sworn, personally came J. Z. Bayless to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal] JAMES CHRISTOE,
Notary Public in and for the District of Alaska, residing at Treadwell.

Filed for record March 13, 1911, recorded Bk. 23 Deeds, Pg. 441.

Territory of Alaska,
Juneau Recording Precinct,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original records as taken from Book 23 of Deeds on page 441 of the records of the Juneau Recording District, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

[Seal] JOHN B. MARSHALL,
U. S. Commissioner and Ex-officio District Recorder. [188]

Alaska Juneau Company's Exhibit "X."

(Received in evidence, Apr. 16, 1915.)

THIS INDENTURE, made this 22nd day of August, A. D., 1914, between Jimmie Bean, as an individual, and as chief of the Taku Tribe of Natives, and Mrs. Sallie Bean, his wife, formerly the wife of Chief Johnson, first parties; and the Alaska Juneau Gold Mining Company, a corporation, second party:

WITNESSETH: That whereas, the first parties were the owners of a certain tract of ground hereinafter more definitely described which said tract of ground together with the tide lands lying in front

Cor. #2, thence N. 52 deg. W. 540 feet to Cor. #3, thence N. 33 deg. 15' E. 403 feet to Cor. #4, thence S. 52 Deg. E. 540 feet to Cor. #1, the place of beginning.

Together with and all singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. Z. BAYLESS. (Seal)

Signed, Sealed and Delivered in presence of

C. W. RUSSEL.

NEAL C. HAWLEY. [187]

District of Alaska, U. S. A.,—ss.

THIS IS TO CERTIFY, that on this 22nd day of July, A. D., 1911, before me, James Christoe, Notary Public in and for the District of Alaska duly commissioned and sworn, personally came J. Z. Bayless to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal] JAMES CHRISTOE,
Notary Public in and for the District of Alaska, residing at Treadwell.

Filed for record March 13, 1911, recorded Bk. 23 Deeds, Pg. 441.

Territory of Alaska,
Juneau Recording Precinct,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original records as taken from Book 23 of Deeds on page 441 of the records of the Juneau Recording District, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

[Seal] JOHN B. MARSHALL,
U. S. Commissioner and Ex-officio District Recorder. [188]

Alaska Juneau Company's Exhibit "X."

(Received in evidence, Apr. 16, 1915.)

THIS INDENTURE, made this 22nd day of August, A. D., 1914, between Jimmie Bean, as an individual, and as chief of the Taku Tribe of Natives, and Mrs. Sallie Bean, his wife, formerly the wife of Chief Johnson, first parties; and the Alaska Juneau Gold Mining Company, a corporation, second party:

WITNESSETH: That whereas, the first parties were the owners of a certain tract of ground hereinafter more definitely described which said tract of ground together with the tide lands lying in front

of the same have been owned and possessed by the first parties ever since the year 1881 when gold was first discovered near Juneau; that they have been in the actual and continued possession of the said ground ever since; that they have erected boat houses at various places on the beach in front of said ground and have been in the possession and use of said beach between the ordinary high tide *and the* line and the line of low tide ever since the year 1881, and have used the said beach for the purpose of ingress and egress to deep water as well as for other purposes, including places for boat houses, skidways for boats and canoes, and other uses.

And, Whereas, on the 30th day of April, A. D. 1913, the first parties made a certain indenture to the second party in which certain premises were indefinitely described, these presents is intended to more definately describe said premises.

NOW, THEREFORE, in consideration of three hundred dollars (\$300.00) paid to the first parties by the second party, the receipt whereof is hereby acknowledged, the first parties do by these presents, grant, bargain, sell, convey and confirm unto the second party, its successors and assigns, that certain parcel of ground, as well as the tide lands lying in front of and abutitng upon the same situate within the incorporated limits of the town [189] of Juneau, Alaska, and a short distance Southerly from the townsite limits of said town of Juneau, which said premises are more definately described as follows, to wit:

Commencing at Cor. No. 1 of the Abe Lincoln

Lode mining claim, U. S. Survey No. 597, which is identical with Cor. No. 4 of the General Grant lode mining claim U. S. Survey No. 597, from which U. S. L. M. No. 1 bears S. 17 deg. 02' E. 6851.7 ft. thence S. 33 deg. 34' E. 106.5 ft; thence S. 45 deg. 31' E. 303.7 ft; thence N. 54 deg. 39' E. 150 ft; thence N. 39 deg. 43' W. 533.59 ft; thence S. 58 deg. 51' W. 150 ft. thence S. 31 deg. 09' E. 138 ft. to point of beginning.

Together with all the tide lands adjacent to and lying between the said described upland and the deep water of Gastineau Channel, with the right of ingress and egress, as well as all littoral and riparian rights, and all and singular the tenements, heridataments and appurtenances belonging to said property or in anywise appertaining to the same, and the reversion, remainders, rents, issues and profits thereof.

To have and to hold, all and singular the said premises, together with the appurtenances unto the said second party, its successors and assigns forever.

In Witness Whereof, the said first parties have hereunto set their hands and seals the day and year in this instrument first above written.

his

JIMMIE X BEAN. (Seal)

mark

his

JIMMIE X BEAN. (Seal)

mark

As chief of the Taku Tribe of Natives.

her

SALLIE X BEAN. (Seal)

mark

Witness to Jimmie Bean's signature by mark:

J. A. HELLENTHAL,

PETER LAWRENCE.

Witness to Sallie Bean's signature made by mark:

S. HELLENTHAL,

PETER LAWRENCE. [190]

United States of America,

Territory of Alaska,—ss.

On this 22d day of August, A. D., 1913 before me, personally appeared Jimmie Bean, to me known to be the individual described in and who executed the foregoing instrument and the said Jimmie Bean acknowledged to me that he executed the same as his free and voluntary act, both as Chief of the Taku Tribe of Natives, and in his individual capacity, for the uses and purposes therein expressed.

[Notarial Seal]

SIMON HELLENTHAL,

Notary Public for Alaska.

My commission expires November 29, 1913.

United States of America,

Territory of Alaska,—ss.

On this 25th day of August, A. D. 1913, before me personally appeared Sallie Bean, to me known to be the individual described in and who executed the foregoing instrument and the said Sallie Bean acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and

purposes therein expressed.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires November 29, 1913.

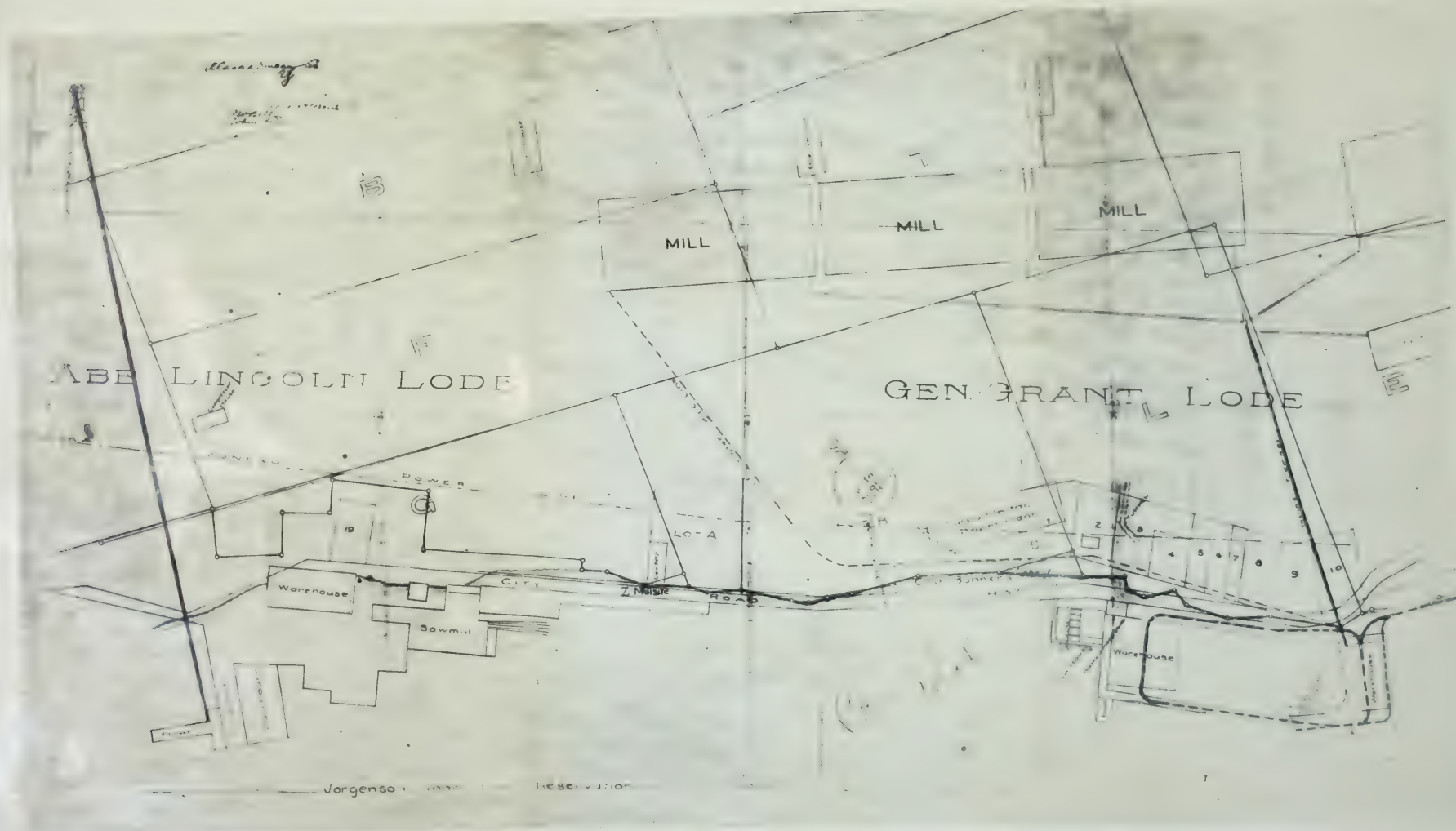
Filed for record August 25, 1913, and recorded 24
Deeds, pp. 99.

United States of America,
Territory of Alaska,—ss.

I do hereby certify that the foregoing is a true and
correct copy of the original records as shown from
Book 24 of Deeds on Page 99, records of the Juneau
Recording District, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

[Seal] JOHN B. MARSHALL,
U. S. Commissioner and Ex-officio District Recorder.
[191]



Alaska Juneau Company's Exhibit "Z."

(Received in evidence Apr. 16, 1915.)

THIS INDENTURE, made this 1st day of May, A. D. 1913, between Fanny Johnson, Jimmie Johnson, Thomas Johnson and Louisa Johnson, Alaska natives, first parties; and the Alaska Juneau Gold Mining Company, a corporation, second part;

WITNESSETH: That for and in consideration of the sum of Seven Hundred and Ten Dollars (\$710.00), the receipt whereof is hereby acknowledged, do by these presents, remise, release and forever quitclaim unto the said second part, its successors and assigns, the following described tracts or parcels of land situate, lying and being within the corporate limits of the town of Juneau, Territory of Alaska, and a short distance southerly from the townsite limits of said town, a more particular description as follows, to wit:

Beginning at the S. S. corner, a rock 30"x14"x8 ins. *whone* a copper pin set in drill hole in boulder 10 ft. long, 4 ft. high, bears S. 30° 59' W. 378.40 ft. distant; thence N. 48° 30' E. 135.4 ft. to the S. E. corner; thence N. 31° 30' W. 70.6 ft. to the S. E. corner; thence S. 48° 30' W. 128.5 ft. to the N. W. corner; whence cabin 10x12 ft. bears N. 27° 12' E. 66.6 ft. distant; thence S. 35° 55' E. 71.0 ft. to the S. W. corner or place of beginning, containing on area of 0.213 acres. Magnetic variation 31° 20' E. and courses described from the true meridian.

Together with the littoral rights and right of in-

gress and egress to and from deep water.

And also the following described parcel:

Commencing at a point of the meander line of Gastineau Channel, from which Cor. No. 6 of the General Grant Lode, U. S. Survey No. 597, as surveyed for patent, bears N. 20° 26' W. 9.8 ft.; thence N. 57° 7' E. 108 ft.; thence N. 20° 26' W. 10.4 ft.; thence N. 45° 31' W. 79.3 ft.; thence S. 54° 39' W. 106.7 ft. to mean high tide line of Gastineau Channel; thence S. 45° 31' E. 74.5 ft. to said Cor. No. 6 of General Grant Lode; thence S. 20° 26' E. 9.8 ft. to place of beginning. [193]

Together with the right or ingress and egress to and from deep water and the littoral rights.

And all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances unto the said second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said first parties have hereunto set their hands and seals the day and year in this instrument first above written.

her

FANNIE X JOHNSON. (Seal)

mark

his

JIMMIE X JOHNSON. (Seal)

mark

TOM JOHNSON. (Seal)

LOUISA JOHNSON. (Seal)

Signed, sealed and delivered, and the crosses made in the presence of:

R. E. PENGLASE.

S. HELLENTHAL.

United States of America,
Territory of Alaska,—ss.

On this 1st day of May, 1913, before me, personally appeared Fannie Johnson, Jimmie Johnson and Thomas Johnson, to me known to be the parties described in and who executed the foregoing deed, and acknowledged to me that they each of them signed and sealed the same as his and her free and voluntary act and deed for the uses and purposes therein expressed.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

United States of America,
Territory of Alaska,—ss.

On this 8th day of May, A. D. 1913, before me, personally appeared Louisa Johnson, to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes herein expressed.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska. [194]

Filed for record at 10 o'clock A. M., May 8, 1913,
and recorded in Book 24 Deeds, page 10.

G. C. WINN,
District Recorder.

United States of America,
Territory of Alaska,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original records as taken from Book 24 of Deeds, on page 10, Records of Juneau Recording District, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

[Seal] JOHN B. MARSHALL,
U. S. Commissioner and Ex-officio District Recorder.
[195]

Alaska Juneau Company's Exhibit "A-1."

(Received in evidence Apr. 16, 1915.)

THIS INDENTURE, made this 25th day of July, A. D., 1912, between JOHN JACKSON, an Alaskan Native, the first party, of Juneau, Alaska, and the ALASKA JUNEAU GOLD MINING COMPANY, a corporation, the second party;

WITNESSETH: The *the* first party, for and in consideration of the sum of Six Hundred and Five (\$605.00), money of the United States of America, to him in hand paid by the party of the second part, or second party, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever quit-claim unto the party of the second part, or second party, its successors and assigns, the following described parcel of land situated on the meander line of Gastineau Channel and adjoining the townsite of Juneau on the South East, and about a quarter of a mile from the South East boundary of

the townsite, in the District of Alaska, Juneau Recording District, a more particular description is as follows, to wit:

Commencing at the N. W. Corner of Lot —; whence cable pole bears N. $25^{\circ} 30'$ W. 112 ft. distant, and N. W. corner of house 16 by 24 ft. square bears N. $79^{\circ} 30'$ E. 11.50 ft. distant; thence N. $59^{\circ} 30'$ E. 100 ft. to N. E. corner of lot; thence S. $35^{\circ} 30'$ E. 58 ft. to S. E. corner of lot; thence S. $59^{\circ} 30'$ W. 100 ft. to S. W. corner of lot and meander line of Gasitneau Channel, thence N. $35^{\circ} 30'$ W. 58 ft. along the meander line of Gastineau Channel to N. W. corner of lot and the place of beginning, containing an area of 14 acres, more or less. Magnetic variation $30^{\circ} 00'$ E. of N., together with the tide lands and water-front privileges lying in front of and used in connection with the above premises.

Together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the remainders, reservoirs, issues and profits thereof. [196]

To have and to hold, all and singular, the said premises, together with the appurtenances unto the said second party, its successors and assigns, forever.

IN WITNESS WHEREOF, said first party has hereunto set his hand and seal on the day and year first in this instrument above written.

his

JOHN X JACKSON. (Seal)

mark

Signed, sealed and delivered in the presence of:

ROBT. A. KINZIE.

S. HELLENTHAL.

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY, that on this 25th day of July, A. D. 1912, before me, the undersigned, a Notary Public in and for the District of Alaska, personally appeared JOHN JACKSON, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that the same was his free and voluntary act and deed for the uses and purposes therein expressed.

WITNESS my hand and official seal the day and year last in this certificate above written.

[Notarial Seal] SIMON HELLENTHAL.

Notary Public for Alaska. [197]

Plaintiff's Exhibit "H-1."

(Received in evidence Apr. 16, 1915.)

District of Alaska,
Juneau Recording District,—ss.

The within instrument was filed for record at 6 o'clock P. M. Aug. 23, 1895, and duly recording in book 11, on page 20 of the records of said District.

H. W. MELLEN,
District Recorder.

**NOTICE OF LOCATION OF QUARTZ CLAIM.
GENERAL GRANT.**

NOTICE IS HEREBY GIVEN to all to whom it may concern that James McCloskey and Angus McDonald, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place, bearing gold within the

limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, Chapter VI, Title 32, located fifteen hundred (1500) linear feet of this vein or lode, with surface ground six hundred feet in width, situated in Harris Mining District, District of Alaska, and known as the General Grant Quartz Mining Claim, and more particularly described as follows, to wit: Fifteen hundred feet of said lode claim so lying and being east of the discovery stake and notice. Said lode claim being situated on the North shore of Gastineau Channel, East of the Town of Juneau Alaska, about 1600 feet east of the wharf at said Town of Juneau known as Carroll's Old Wharf. The said General Grant Lode Claim is bounded on the west end thereof by the Abe Lincoln Lode; all corners of said claim are distinctly marked and established on [198] the ground by monuments of stone on the beach and by trees, and stumps on the north side of said claim. The exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monument above designated. And we intend to hold and work said claim as provided by the local customs and rules of miners and the Mining Statutes of the United States. Dated on the ground the 1st of August, 1895. Discovered July 15, 1895.

JAMES McLOSKEY, and
ANGUS McDONALD,

Locators.

United States of America,
Territory of Alaska,
Juneau Precinct,—ss.

I DO HEREBY CERTIFY that the foregoing is a true and correct copy of the original records as taken from Book 11 of Lodes on page 26, of the records of the Juneau Recording Precinct, Alaska, and the whole thereof.

Dated this 16th day of April, 1915.

JOHN B. MARSHALL,
U. S. Commisisoner and Ex-officio District Recorder.
[199]

Alaska Juneau Company's Exhibit "K-1."

(Received in evidence Apr. 17, 1915.)

NOTICE OF AMENDED LOCATION.

NOTICE IS HEREBY GIVEN, that the undersigned, having complied with the requirement of Chapter Six, Title Thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations, has this day made an amended location of 0.58 acres on the "U" Millsite, situated in Harris Mining District, Territory of Alaska, and described as follows:

Beginning at Cor. No. 1 identical with Cor. No. 2, the west corner of the "A" millsite, thence S. 32 deg. 32½' W. 110 feet to Cor. No. 2; thence North 44 deg. 05' W. 228 feet to Cor. No. 3; thence North 32 deg. 32½' E. 110 feet to Cor. No. 4; thence S. 44 deg. 05' E. 228 feet to Cor. No. 1 the place of beginning. This claim lies on the shore of Gasitneau Channel at the S. E. end of the town of Juneau, bounded on the S. E.

by the "L" Millsite, on the N. E. by the "A" Millsite and on the S. W. by Gastineau Channel.

NOTICE IS ALSO GIVEN that this is an amended location, made for the purpose of more particularly describing the boundaries of the said "U" Millsite and correcting any errors in the original, which was made and notice of which was posted on the 3d day of February, 1913, and that none of the rights, benefits and privileges accruing under and by virtue of the said original location are in anywise forfeited or released in making this amended location.

Date of amended location Feb. 15th, 1913.

R. G. WAYLAND,
Locator.

Witnesses: G. J. JOHNSON.

Filed for record at 2:33 P. M., Feb. 15, 1913, and recorded in Book 11 Placers on page 135.

G. C. WINN,
District Recorder. [200]

United States of America,
Territory of Alaska,
Juneau Precinct,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original location notice as taken from Book 11 of Placers on page 135, records of the Juneau Recording District, Alaska, and the whole thereof.

Dated at Juneau, Alaska, April 17th, 1915.

[Com. Seal] JOHN B. MARSHALL,
U. S. Commissioner and Ex-officio District Recorder.
[201]

Alaska Juneau Company's Exhibit "N-1."

(Received in evidence April 17, 1915.)

THIS INDENTURE, made this fifteenth day of February in the year of our Lord one thousand nine hundred and thirteen, between R. G. Wayland, the party of the first part, and the Alaska Juneau Gold Mining Company, the party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of One and no/100 Dollars, coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever quitclaim unto the said party of the second part, and to its successors and assigns, the following described tract, lot or parcel of land, situated, lying and being in Harris Mining District, Territory of Alaska, particularly bounded and described as follows, to wit:

That certain mining claim known as the "U" mill-site and described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 2, the west corner of "A" millsite, thence S. 32 deg. 32½' W. 110 feet to Cor. No. 2, thence N. 44 deg. 05' W. 228 feet to Cor. No. 3, thence N. 32 deg. 32½' E. 110 feet to Cor. No. 4, thence S. 44 deg. 05' E. 228 feet to the place of beginning; bounded on the S.E. by the "L" millsite, on the N.E. by the "A" millsite and on the S.W. by the Gastineau Channel.

Together with and all singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and

reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto said party of the second part, and its successors and assigns, forever. [202]

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

R. G. WAYLAND. (Seal)

Signed, sealed and delivered in presence of:

G. J. JOHNSON,

R. G. DATSON.

Territory of Alaska,

U. S. A.,—ss.

THIS IS TO CERTIFY, that on this 15th day of February, A. D. 1913, before me, James Christoe, notary public in and for the District of Alaska, duly commissioned and sworn, personally came R. G. Wayland, to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Notary Seal]

JAMES CHRISTOE,

Notary Public in and for the District of Alaska, residing at Treadwell.

Filed for record at 11:10 A. M., September 9, 1913,
and recorded in Book 24 of Deeds, page 142.

JOHN B. MARSHALL,

District Recorder.

United States of America,
Territory of Alaska,
Juneau Precinct,—ss.

I hereby certify that the foregoing is a true and correct copy of the original records as taken from Book 24 of Deeds, on page 142, of the records of the Juneau Recording Precinct, Alaska, and the whole thereof.

Dated Juneau, Alaska, April 17, 1915.

[Seal]

J. B. MARSHALL,

United States Commissioner, Ex-officio Recorder.

[203]

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions having been examined by me and found to conform to the truth and to contain all the evidence adduced and all the proceedings had upon the trial of the above-entitled cause, it is hereby settled and allowed as such and ordered filed as the Bill of Exceptions herein.

Done in open court this 14th day of August, 1915.

ROBERT W. JENNINGS,

District Judge.

Filed in the District Court, District of Alaska,
First Division. Aug. 14, 1915. J. W. Bell, Clerk.
By —————, Deputy. [204]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation.

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Assignment of Errors.

Comes now the above-named defendant Worthen Lumber Mills, a corporation, the appellant herein, and files the following assignment of errors upon which it will rely in the prosecution of its appeal in the above-entitled cause:

I.

The Court erred in not making a finding of fact as follows, to wit:

That at the time of the commencement of this action, for several years prior thereto, defendant was and ever since has been in sole and exclusive possession and occupancy of that certain strip of ground below mean high tide, on the northeasterly shore of Gastineau Channel, and adjoining the seaward side of Franklin Street, in the town of Juneau, Alaska; said premises being a strip of ground sixteen (16) feet wide and four hundred (400) feet long, extending from a point on the southwesterly side of said Franklin Street 1555.8 feet in a southeasterly direction from corner No. 1 of the townsite of Juneau;

thence in a southeasterly direction along and adjoining the southwesterly side of Franklin Street, a distance of 400 feet. [205]

II.

The Court erred in not making a finding of fact as follows, to wit:

That Franklin Street, in the town of Juneau, Alaska, is public thoroughfare constructed, established, and maintained as such by the municipal corporation of the town of Juneau, Alaska, and that in its entire width, which is twenty (20) feet, it is below the line of mean high tide of Gastineau Channel, for the length of four hundred (400) feet immediately above the premises or strip of ground heretofore described and in the possession and occupancy of defendant.

III.

The Court erred in not making a finding of fact as follows, to wit:

That the premises above line of mean high tide, directly across the said street or thoroughfare, known as Franklin Street, from the aforesaid premises occupied by and in the possession of defendant, are held, claimed and occupied by plaintiff corporation by means of certain unpatented millsite locations for which said plaintiff corporation is at present applying for patent from the United States.

IV.

The Court erred in not making a finding of fact as follows, to wit:

That immediately below and to the seaward of the said premises, heretofore described as occupied by

and in the possession of defendant, are the navigable waters of Gastineau Channel, which latter, for several years last past has been and is now being used by the defendant for towing and floating saw logs to a certain sawmill plant owned and operated by defendant on the premises immediately to the northwest of the said strip of ground sixteen feet by four hundred feet above described.

V.

The Court erred in not making a finding of fact as follows, to wit: [206]

That in case plaintiff should erect a wharf over the navigable waters of Gastineau Channel, in front of and to the seaward of said strip of ground sixteen (16) feet by four hundred (400) feet above described, to the deep waters of said channel, where ocean-going vessels may land and discharge cargoes, the said sawmill plant belonging to defendant on the adjoining premises will be greatly depreciated in value and rendered useless for sawmill purposes, by reason of the obstruction of the natural channel for the towing of logs to said sawmill plant, and the defendant will thereby be irreparably injured in its rights.

VI.

The Court erred in not making a finding of fact as follows, to wit:

That plaintiff is the owner of more than 8000 feet of waterfront on the northeasterly shore of Gastineau Channel, commencing at approximately 1000 feet to the northwest of the premises here in question, and extending approximately 7000 feet along line of mean high tide of Gastineau Channel about 7000

feet, in a southeasterly direction.

VII.

The Court erred in not making a finding of fact as follows, to wit:

That plaintiff intends to wash and sluice debris and tailings into the waters of Gastineau Channel, on the seaward side of said Franklin Street, in the town of Juneau, immediately underneath and to the seaward of the said tract sixteen (16) feet by four hundred (400) feet, occupied by defendant as aforesaid, and to that extent obstruct navigation in front of said premises; and also desires to erect a wharf in front of said premises and over the navigable waters of said Gastineau Channel to deep water where ocean-going vessels can discharge cargo; but that the said plaintiff corporation has received no permit from the Secretary of War to deposit such debris [207] or tailings into the said waters of Gastineau Channel, or to erect any such wharf over said waters.

VIII.

The Court erred in making and filing the finding of fact, as follows, to wit:

That on the 23d day of August, 1911, plaintiff became and at all times since has been the owner and in possession and entitled to the possession of those two mining claims situated on Gastineau Channel, a navigable arm of the North Pacific Ocean, near the city of Juneau, known as the Abe Lincoln and General Grant. Said claims were and are the upland upon which abuts the tide-land involved in this litigation.

IX.

The Court erred in making and filing the finding of fact, as follows, to wit:

That said tide-land is shoal water lying immediately between said upland and the navigable waters of Gastineau Channel.

X.

The Court erred in making and filing the finding of fact, as follows, to wit:

That the plaintiff did not consent to or give the city any right whatever to construct said road, but that the same was constructed without consulting the plaintiff; that the construction and maintenance of said street does not and never did interfere with any of the plaintiff's rights, and that it is so constructed that plaintiff can wharf out and have access to deep water notwithstanding said plank road.

XI.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff, by reason of being the owner of millsite [208] locations has no littoral or riparian right of access to navigable water.

XII.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff, by reason of being the upland owner, has no riparian right or littoral right to any of the shore of Gastineau Channel below Franklin Street, at the point where the said Franklin Street runs on or below the line of mean high tide.

XIII.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff corporation has no right separate and apart from the public right to wharf out from the lower side of Franklin Street opposite the premises in controversy in this cause.

XIV.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff has no authority to deposit debris or erect a wharf in or over the waters of Gastineau Channel below mean high tide.

XV.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff has not suffered, nor is suffering, nor will suffer any special and peculiar injury different from the injury suffered or sustained by the public generally, by reason of the defendant's possession and occupancy of the strip of ground sixteen (16) feet wide by four hundred (400) feet long, adjoining the lower and seaward side of Franklin Street in front of the premises here in controversy. [209]

XVI.

The Court erred in not making and filing the following conclusion of law, to wit:

That plaintiff corporation is not entitled to the relief prayed for in the complaint nor any relief at all.

XVII.

The Court erred in making and filing the following

conclusion of law, to wit:

That the plaintiff is and was at the time of the commencement of this suit, and of the doing and threatening to do the things mentioned in the complaint, the owner, in possession and entitled to the possession, of the upland lying along the shore of Gastineau Channel between the southerly end of the Jorgenson reservation to the fish-house, situate approximately 400 feet to the south of the southerly end of said Jorgenson reservation.

XVIII.

The Court erred in making and filing the following conclusion of law, to wit:

That the plaintiff as the owner of the uplands above referred to, is entitled to all the littoral rights attached to uplands abutting on a navigable highway, and more particularly to the right of access over said tide-lands to the navigable waters of Gastineau Channel, and the right to construct a wharf as an aid to the exercise of the said right of access.

XIX.

The Court erred in making and filing the following conclusion of law, to wit:

That plaintiff is entitled to a decree of this Court enjoining the defendant from constructing, continuing or maintaining on the tide-land in question any structure of any nature or description which in any ways cuts off, obstructs or intereferes with the said free and uninterrupted access and the building of said wharf. [210]

XX.

The Court erred in entering a decree against the defendant.

WHEREFORE, the defendant above named, the appellant, prays that the judgment herein be reversed.

JOHN RUSTGARD,

Attorney for Defendant and Appellant. [211]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

**Petition for Appeal, Order Allowing Same and
Fixing Amount of Bond for Costs.**

Worthen Lumber Mills, a corporation, defendant above named in the above-entitled cause, feeling itself aggrieved by the decision, decree and judgment given and entered herein in favor of plaintiff and against this defendant on the 27th day of July, 1915, hereby appeals from said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that said appeal be allowed, and that the Court make an order fixing the amount of

security to be given on said appeal.

JOHN RUSTGARD,
Attorney for defendant and appellant.

Order.

Now on this 14th day of August, 1915, the foregoing appeal is hereby allowed, the defendant to give a bond in the sum of \$250.00, conditioned according to law and to be approved by this Court.

Done in open court this 14th day of August, 1915.

ROBERT N. JENNINGS,
District Judge. [212]

Copy of the Within Assignment of Errors, Petition Received and Due Service of Same for Appeal, Order Allowing Same and Fixing Amount of Bond for Costs Acknowledged this 14th Day of August, 1915.

HELLENTHAL & HELLENTHAL,
By R. E. PENGLASE,
Attorney for Plaintiff and Appellee.

[Endorsed]: Original No. 1020-A. In the District Court Division No. 1, Territory of Alaska, Alaska Juneau Gold Mining Company, a Corporation, Plaintiff vs. Worthen Lumber Mills, a Corporation, Defendant. Assignment of Errors. Petition for Appeal, Order Allowing Same and Fixing Amount of Bond for Costs. John Rustgard, Attorney for Defendant and Appellant. Filed in the District Court, District of Alaska, First Division, Aug. 14, 1915, J. W. Bell. By —————, Deputy. [213]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Worthen Lumber Mills, a corporation, as principal, and H. S. Worthen and Earle E. Smith, as sureties, are held and firmly bound unto the Alaska Juneau Gold Mining Company, a corporation, the plaintiff above named, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to said plaintiff, its successors or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally and our and each of our successors, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 14th day of August, 1915.

The condition of this obligation is such that,

WHEREAS, the above-named defendant Worthen Lumber Mills has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment and decree made an en-

tered by the United States District Court of the District of Alaska, Division Number One thereof, at Juneau, on the 27th day of July, 1915, against the said defendant and in favor of said plaintiff;

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute said appeal to [214] effect and answer all costs, if he fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

WORTHEN LUMBER MILLS.

By H. S. WORTHEN, (Seal)
President.

H. S. WORTHEN (Seal)
EARLE E. SMITH (Seal)

United States of America,
District of Alaska,—ss.

H. S. Worthen and Earle E. Smith, being duly sworn, each for himself deposes and says:

That he is one of the sureties who signed the foregoing Bond on Appeal; that he is worth more than the sum of \$250.00, over and above all his debts and liabilities and exclusive of property exempt from execution; that he is not a counsellor, attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court, and that he is a resident within the District of Alaska, Division Number One thereof.

H. S. WORTHEN.
EARLE E. SMITH.

Subscribed and sworn to before me this —— day of August, 1915.

[Seal]

JOHN RUSTGARD,

Notary Public in and for Alaska.

My commission expires September 14, 1918.

The foregoing Bond is hereby approved in open court this 14th day of August, 1915.

ROBERT W. JENNINGS,

District Judge. [215]

Copy of within bond on appeal received and due service of same acknowledged this 14th day of August, 1915,

HELLENTHAL & HELLENTHAL,

R. E. PENGLASE,

Attorney for Plaintiff and Appellee.

Original No. 1020-A. In the District Court Division No. 1, Territory of Alaska, Alaska Juneau Gold Mining Company, a Corporation, Plaintiff vs. Worthen Lumber Mills, a Corporation, Defendant. Bond on Appeal. John Rustgard, Attorney for Defendant and Appellant. Filed in the District Court, District of Alaska, First Division, Aug. 14, 1915. J. W. Bell, Clerk. By —— Deputy. [216]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

WORTHEN LUMBER MILLS, a Corporation,
Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,
Appellee.

Citation.

United States of America,—ss.

The President of the United States, to Alaska Juneau Gold Mining Company, a Corporation, Appellee, and Hellenthal and Hellenthal, Esquires, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, on the tenth day of September, 1915, pursuant to an order allowing an appeal, entered in the clerk's office of the District Court of the District of Alaska, Division Number One thereof at Juneau, in that certain action No. 1020-A, in which Alaska Juneau Gold Mining Company, a corporation, is plaintiff and appellee, and Worthen Lumber Mills, a corporation, is defendant and appellant, to show cause, if any there be, why the decree and judgment rendered against the said appellant, as in said order allowing the appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ROBERT W. JENNINGS, Judge of the United States District Court in and for the District of Alaska, Division Number One, this 14th day of August, 1915.

ROBERT W. JENNINGS,
Judge of the United States District Court, District
of Alaska, Division Number One.

Attest: J. W. BELL,
Clerk of Said Court. [217]

Copy of within citation received and due service of same acknowledged this 14th day of August, 1915.

HELLENTHAL & HELLENTHAL,

By R. E. PENGLASE,

Attorney for Appellee. [218]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Worthen Lumber Mills, a Corporation, Appellant, vs. Alaska Juneau Gold Mining Company, a Corporation, Appellee. Citation. Filed in the District Court, District of Alaska, First Division. Aug. 14, 1915. J. W. Bell, Clerk, By ————— Deputy.

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1020-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please certify to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the following records in the above-entitled cause, to wit:

Complaint.

Answer.

Reply.

Findings of Facts and Conclusions of Law.

Decree.

Opinion of the Court.

Bill of Exceptions.

Assignment of Errors.

Petition for Appeal.

Order Allowing Appeal.

Bond on Appeal, and

Citation.

Dated at Juneau, Alaska, this 14th day of August, 1915.

JOHN RUSTGARD,

Attorney for Defendant and Appellant. [219]

Copy of within Praecipe received and due service of same acknowledged this 14th day of August, 1915.

HELLENTHAL & HELLENTHAL,

By R. E. PENGLASE,

Attorney for Plaintiff and Appellee. [220]

[Endorsed]: No. 1020-A. In the District Court, Division No. 1, Territory of Alaska. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff, vs. Worthen Lumber Mills, a Corporation, Defendant. Praecipe. Filed in the District Court, District of Alaska, First Division. Aug. 14, 1915. J. W. Bell, Clerk. By —————, Deputy.

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate [of Clerk U. S. District Court to
Transcript of Record].**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 220 pages of typewritten matter and exhibits, numbered from 1 to 220, both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the praecipe of Plaintiff in Error, on file in my office and made a part hereof; in cause No. 1020-A, wherein the Worthen Lumber Mills, a Corporation is Plaintiff in Error and the Alaska Juneau Gold Mining Company, a corporation, is Defendant in Error.

I further certify that the said record is by virtue of a Citation issued in this Cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to One Hundred Twenty-one 85/100 Dollars, (\$121.85), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled Court this 17th day of August, 1915.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 2640. United States Circuit Court of Appeals for the Ninth Circuit, Worthen Lumber Mills, a Corporation, Appellant, vs. Alaska Juneau Gold Mining Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed August 24, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit

WORTHEN LUMBER MILLS,

Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,

Appellee

Brief for Appellant

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1

Filed

OCT 24 1915

JOHN RUSTGARD,

F. D. Monckton,
Clerk.

Attorney for Appellant

United States
Circuit Court of Appeals
For the Ninth Circuit

WORTHEN LUMBER MILLS,

Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,

Appellee

Brief for Appellant

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1

JOHN RUSTGARD,

Attorney for Appellant

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BRIEF OF APPELLANT

STATEMENT OF CASE.

For a period of thirteen years before the commencement of this action, the defendant below and its predecessors in interest had been operating a saw-mill on the shores of Gastineau Channel, within the corporate limits of the town of Juneau, had established booming grounds for logs along the beach, had been in the habit of towing the logs up to the mill over the tide waters near the shore, and had built platforms over tide waters, on the seaward side of and adjoining the city street, for use as lumber yards.

At the time of the commencement of this action, appellant was in peaceable possession of the premises in question and had driven a large number of piles on the tide flats between its booming grounds and the street, and was placing a platform thereon for use in connection with its lumber yards. This action was instituted to enjoin appellant from maintaining this structure and to allow appellee to take possession of and erect a wharf over appellant's said booming ground. Appellee obtained the decree as prayed for and which, in effect, authorizes appellee to construct a wharf over the premises occupied by appellant for lumber yards and over the waters used

by it for floating logs up to its mill. This appeal is from that decree.

Appellee contends that it is the owner of the upland down to line of mean high tide and that as such it has a vested, absolute and exclusive right to wharf out to deep water over the tide lands and waters occupied and used by appellant, and that by reason of appellants obstruction of the navigable waters in front of appellee's upland, the latter has suffered special injury different in character from the injury suffered by the public.

Appellant answers:

1. That no one, whether littoral owner or not, has any right to wharf out over navigable water except by leave of the Secretary of War in pursuance of statutes of the United States in that behalf enacted.

2. That appellee, upon the facts in this case, can have no title, if any, to the upland except under a millsite location, and that, in Alaska, a millsite cannot be laid within sixty feet of navigable waters for the reason that such strip of waterfront is reserved by the government for a public highway, and that if, nevertheless, a millsite is located clear down to line of high tide, the public have a right of way over the sixty feet of it adjoining the water, and that therefore no littoral right attaches to a millsite in Alaska, but that all such rights have in that territory been reserved for the public.

3. That even if the court should hold that there is no such road reservation in front of appellee's alleged premises, there is in this particular case a public

street constructed and maintained by the town of Juneau known as Franklin street, in front of the premises here in question, which street is below line of mean high tide and therefore *borders* on navigable water.

The law is well settled that where a public highway *borders* on navigable water the right of access between the street and the water is public and not a private right, or, as is said, a waterfront street cuts off private littoral right. Under the facts in this case appellee has, therefore, suffered no private injury, but the wrong complained of is purely a public wrong and can be redressed only at the instance of the public.

Appellee's Title.

Appellee in its complaint asserted title to the upland from three separate and conflicting sources: (1) That the upland is mineral land and that as such the appellee holds it under the "General Grant" lode location; (2) that it is non-mineral and as such is held as millsite "A" and millsite "U"; and (3) that certain Indians, prior to any lode or millsite location, owned and occupied it under the law of May 17, 1884, and that, being prior in time, their rights were superior, and they therefore owned the upland until they conveyed it in 1913 to appellee.

The learned court below found that appellee held title under all three of these conflicting claims. (p. 44.)

Appellant contends that appellee cannot possibly

hold under more than one of these titles, for to say that one is valid is tantamount to asserting that the others are not. The question is: Which is valid? If the premises are mineral and "General Grant" is a valid lode location, then the millsites must be invalid, because no mineral ground can be taken for millsites. If, on the other hand, the millsites are valid, the premises must be non-mineral in character and the "General Grant" is therefore invalid.

Again, the "General Grant" was located in 1894; the millsites still later. The Indians, so it is alleged and so the court found, settled upon the premises prior to 1884 and continued to occupy and claim them until 1913 when their title was purchased by appellee. The law under which this Indian title was found to be good provides:

"That the Indians, or other persons in said District, shall not be disturbed in the possession of any land actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

It is evident that, inasmuch as the title to the premises in question was in the Indians under this law, the premises were not open either to mineral or non-mineral location by others. Ergo, if the Indian title was good, neither the lode nor the millsite locations were valid or of any account.

Inasmuch as the finding of the lower court to the effect that all three of these antagonistic titles were valid and vested in appellee, it is obviously erroneous

and can form the basis of no legitimate decree. It devolves upon this court to determine upon the law and the evidence under what title, if any, appellee holds the upland.

No evidence as to question of title to the upland was offered or introduced by appellant.

The Lode Location.

Appellee introduced evidence showing the location of the "General Grant", and then proceeded to attack this title by showing that subsequently and in 1911 the Land Department adjudged the premises covered by this claim non-mineral and refused the patent. At about the same time appellee located the "A" mill-site and in 1913 the "U" millsite, on the theory that the ground was non-mineral, and then purchased the lode location.

Subsequent to the commencement of this action and, in fact, subsequent to the joining of issues, appellee applied for patent to these millsites. In making this application it was necessary, under the rules of the Land Department, for the applicant to swear and for the surveyor to certify that the land was non-mineral in fact. Under these circumstances, appellee is at this time estopped from setting up that the land is essentially mineral and that "General Grant" lode is a valid location.

But, in addition to this, appellee, for the purpose of further showing the invalidity of the lode location, placed a mining engineer on the witness stand who testified, at appellee's request, that the land was non-

mineral in fact. This was never controverted by appellant. Under this evidence it must be held that the lode location was void.

The Millsites.

The "A" millsite was located July, 1911, but it was not actually occupied for millsite purposes, if for any, till after the street was built, and public land cannot be taken and segregated simply by "locating" it. Aside from the Indian title, therefore, the premises covered by the "A" millsite were public land at the time the street was constructed.

The "U" millsite, which covers most of the ground in dispute, was not located till February 15, 1913, after the street had been in operation nearly a year. So far as the tract covered by this location is concerned, the premises belonged to the public domain at the time the street was built, except, of course, for the Indian title.

The Indian Title.

Appellant most earnestly contends that there is no evidence in the records sufficient to support the court's findings that the Indians had a good title to the premises in question, nevertheless, inasmuch as appellee alleged and the learned court below found as a fact that the upland was occupied and owned by certain Indians under the law of 1884 until they sold to appellee in 1913, after Franklin Street was constructed, appellant is disposed to accept the consequences of that finding and to treat it as binding on this appeal. Appellee, having lead the court to make this finding, is estopped from attacking it.

There were three Indian titles set up: First, the title of one Jackson to what is designated as Lot 2 on Exhibit Y and designated as "Chief Johnson or Fish House Lot" on the map attached to the court's findings (p. 48). But this tract has nothing to do with the case. Second, the Johnson family claimed Lot 1. And third, Jimmie Bean claimed Lot B (p. 48). Deeds to these tracts were executed in favor of appellee in 1913.

Appellant now contends that the Indian rights under the Act of 1884 are not assignable and that the deeds operated simply as an abandonment of their rights. (Ch. III.) By reason of this abandonment, the premises reverted to the public domain. Whatever right, if any, appellee has to the upland by reason of the millsites attached after this abandonment by the Indians, which, as has already been pointed out, took place after the street had been constructed by the city.

Appellee insists that there is no road reserve between millsites and navigable water. This is a legal question discussed in Chapter IV of this brief.

Appellee attacks the legality of the street on the ground that it was constructed over its premises without condemnation proceedings and without any *express* permission from the upland owner.

Appellant, however, contends:

1. The legality of the street cannot be assailed in a collateral proceeding. While it is conceded that it is a street *de facto*, it must be treated as such until vacated in direct proceeding against the owner, the city. (Chapter V-A.)

2. That at the time the street was constructed (in 1912) the upland belonged to and was in the possession of certain Indians who subsequently (in 1913) executed deeds therefor to appellee. That by reason thereof the latter took the land with the servitude imposed upon it during the ownership of appellee's grantors. (Ch. V.-C.)

3. Even if the street were constructed without the express consent of the upland owner, it could not be vacated even in a direct proceeding, much less on collateral attack, because:

(a) The upland owner, by allowing the city to expend large sums of money in constructing and maintaining the street, without any protest, is, at this time, estopped from asserting any right to have it closed or vacated. (Ch. V.-D.)

(b) The street was in operation as a public thoroughfare at the time appellant purchased the sawmill properties, and it purchased in reliance upon the protection which that street afforded against any claim of littoral owners. (Ch. V.-D.)

(c) Even if appellee, or other alleged upland owners, were not estopped by laches, but though the street had been constructed over the protest of the land owner, the courts will not, even on direct attack, close a public thoroughfare, but will relegate complainant to his action for damages and leave the street intact. (Ch. V.-E.)

4. The laws pertaining to Alaska reserve to the public ingress and egress on all waters of the Territory, and, in addition thereto, reserve a roadway

sixty feet wide over all non-mineral ground along navigable waters; and that, for this reason, whether the street is "legal" or "illegal", an upland owner on such lands in Alaska has no littoral rights. (Ch. IV.)

5. At the time the street was constructed, and, if not at that time, then afterwards, and before appellee's rights to the upland attached, the upland was public domain and the street became a public thoroughfare by reason of the right extended by Section 2477 R. S. (Ch. V-B.)

There is no conflict in the evidence upon any of the questions involved upon this appeal. The dispute arises over the legal construction to be placed upon the facts disclosed at the trial. These facts have been recited in the foregoing statement.

Appellant excepted to the various findings of facts and conclusions of law made by the lower court and requested various other findings of facts and conclusions of law which were refused by the court, and to which refusal exceptions were duly taken. These exceptions are embodied in the assignment of errors, and as their reiteration at this place could in no way contribute to the further elucidation of the problems before the court, they are omitted.

Inasmuch as this case may have to be submitted upon briefs on behalf of appellant, and inasmuch as the maps attached to the printed records have been so reduced in size as to be in many details unintelligible, the court is respectfully referred to the maps attached to the original transcript for a better and clearer understanding of the situation.

But it should be borne in mind that appellee's Exhibit Y does not show what improvements are actually on the ground, but what it expects to place there in the future (pp. 142-3).

ARGUMENT.

I.

THE STREET CUTS OFF LITTORAL RIGHTS.

For the sake of the argument, let it be conceded at this time that appellee is the owner of the upland down to the line of mean high tide. Let it also be admitted that the street is legally established as a public thoroughfare. It is yet contended that this street does not cut off appellee's littoral right, because, (1) the street is erected below line of mean high tide, and (2) it is so constructed that the upland owner may pass over it and into the navigable waters on the seaward side of it.

1.

The doctrine that a public thoroughfare bordering on navigable water cuts off from the upland owner a private right of access to navigable water and vests such right in the public, is too well established to justify extended discussion.

McCloskey vs. Pacific Coast Co., 160 Fed., 794 (800);

Barclay vs. Howell's Lessees, 6 Pet., 498; (S 12)

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S., 672;
Village of Pewaukee vs. Savoy, 50 L. R. A., 836;
Barney vs. Keokuk, 94 U. S., 324; (340)
Backus vs. Detroit, 49 Mich., 115 (43 Am. R. 447);
Turner vs. Peoples Ferry Co., 21 Fed., 90;
The Schools vs. Risley, 10 Wall., 91;
Town Institute vs. Crothers, 40 Atl., 261;
Smith vs. St. Louis Public Schools, 30 Mo., 290.

It is, however, contended that this applies only when the street is constructed on or along the line of mean high tide. But no such contention finds support in any authority cited. Nor do the reasons upon which the doctrine in question rests allow any distinction in legal effect of a street along line of mean high tide and one below that line.

The law that a public street bordering on navigable waters cuts off the littoral right is based upon the doctrine that navigable waters are a public thoroughfare clear up to line of mean high tide, but that the public have no right to go over this navigable highway to the private premises adjoining it. The right to do so is therefore a private right vested in the land owner adjoining the water. It is for this reason, and none other, that the upland owner may bring action to enjoin obstruction of navigable waters in front of his premises, because such obstruc-

tion, though a public wrong, is also a private wrong to the extent it interferes with ingress to and egress from the private land. Where, however, a public thoroughfare intervenes between the navigable water and the private premises, the right to go from the dry highway to the highway on the water becomes a public right and ceases to be a private privilege. Interference with such right is therefore purely a public and not a private wrong, and cannot be enjoined at the instance of private individuals.

This theory was clearly emphasized by this court in *McCloskey vs. Pacific Coast Co.*, *supra*, on page 800, where it is said, paraphrasing the language of an earlier authority:

“If a public street exists so that its boundary line and water of a navigable lake meet, the riparian right incident to the land composing the street belong to the public and there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake.”

This court then quotes from the same authority as follows:

“In such situation the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water.”

After citing numerous authorities, this court then concludes:

“The doctrine so affirmed rests upon the theory that the private right of access has been

merged in a public right which is inconsistent with its exercise, and, in the application of the doctrine, it is immaterial whether the title to the intervening street is vested in the public or remains in the adjacent owner."

In conformity with the last sentence of the above quotation, it was held that the same rule of law applies though the public have only an easement in the street and though the fee title to it belongs to the upland owner. In this respect this court followed

Barney vs. Keokuk, supra;

Backus vs. Detroit, supra;

Rowan vs. Portland, 8B Mon., 232.

It is, therefore, immaterial whether the fee to the street in question be in the city or not. The right of the public to use the street establishes *ipso facto* the public right of access to it from the water, and *vice versa*.

The lower court argues astutely that the street erected below high tide has a different legal status from a street along line of high tide, because the former is erected upon premises over which the public have a right to pass. The sophistry of the argument is readily exposed by pushing it to its ultimate conclusion.

The court ruled that the ^{up-}public land owner as such had a vested right to erect a wharf over tide lands and to water deep enough to accommodate ocean-going vessels. How is it possible that the littoral owner has such right if the public has an inherent

right to use the same premises for a street? If the appellee erects the proposed wharf, will the court hold that the public has the same right to that wharf and to its use as the appellee, on the theory that it is built over premises belonging to the public or over which the public has an easement? Certainly not. The lower court decided the case on the theory that appellee has a right superior to that of the public to erect a wharf and use it to the exclusion of all others. This is in itself a denial of the other proposition that the public had the right to be left undisturbed in the use of the premises and waters over which the wharf was built.

The moment it is conceded that the public as such had a right to use the tide lands for a street, that moment it is conceded that the appellee had no individual rights there. So, also, the moment it is conceded that the public as such had the right to use the street, that moment it is conceded that the right to wharf out is a public right, and thereby appellee's case falls, for to maintain this action appellee must prove that the nuisance complained of is a private and not a public nuisance.

The sophistry of the lower court is the natural result of its fundamental fallacy that, in spite of the fact that the navigable waters are a public highway clear up to line of mean high tide, the littoral owner has yet an inherent and vested right to obstruct that highway by wharves, no matter how the public may thereby be affected, and the statutes of the United

States notwithstanding. This confusion of the right of access with the right to wharf out is at the bottom of the subtle error. The lower court deliberately reversed the legal principle involved. He held, in effect, that the public right on the tide land was subject to and must yield to the littoral right to wharf out, whereas, the law is well settled that the littoral right can be exercised only subject to the public right and in conformity to such rules and regulations as are prescribed by Congress. This subject will be discussed further in Chapter VI of this brief.

The fact is, that in Alaska the municipalities have been delegated the power over the waterfront and exclusive authority to wharf out. This being so, the city could lawfully construct a waterfront street at any place without leave of the upland owner.

*Subsections 4 and 6 of Sec. 627, Compiled
Laws of Alaska.*

The learned court below had no difficulty in arriving at the conclusion that the use of the tide land for the construction of this street is the kind of use to which public officials are authorized to put these premises. It should be less difficult to arrive at the better settled rule that whatever right the public have over tide lands is paramount to purely private rights of access, and that appellee therefore is not in position to complain.

In conclusion, it remains to be pointed out that to hold that a street along line of mean high tide cuts off the littoral rights, but one which happens at one

short point to be laid below this line preserves the right intact, involves not only a disregard of the reasons upon which the courts have uniformly held that a highway bordering on navigable water vests in the public the right to wharf out from the street, but leads to disastrous practical results. The courts have uniformly held that the main object of a waterfront street is to give the public an easy access to navigable water. Under the theory of the lower court, the closer the street is to deep water, the less right do the public have to wharf out. This would rob a waterfront street of its value as such.

2.

The second argument advanced by the lower court, viz: that the street is so constructed that the upland owner may pass over it and into the waters on the lower side of it, and that therefore it does not cut off the littoral right, has already been partly disposed of.

It would seem elementary that it is not the physical construction of the street which determines the respective and relative rights of the public and the upland owner. It is not the fact that the street forms a barricade, but the fact, that, by reason of the public right upon the street, the private right of access has merged in the public right of access, which renders obstruction of that access a public nuisance instead of a private nuisance.

In none of the cases above cited have the water-

front streets involved formed barricades. On the contrary, they have apparently rendered access to the water much easier. But that right of access had, by means of such street, been changed from a private to a public right. On the other hand, if there ever was a street which formed a barricade between upland and deep water, Franklin street does. It is built on piles from twelve to twenty feet high, with a railing of timbers forty inches high on either side of the driveway. (P. 99 and Ex. 4, 5 and 11.)

Appellee's Authority.

Appellee relies upon *Dalton vs. Hazlett*, 182 Fed. 561, to sustain the proposition that the right of way at or below mean high tide does not cut off the upland owner's littoral rights.

There are expressions in that case which, taken separate and apart from the facts to which they apply, would warrant such interpretation. These facts are stated by this court, on page 570, as follows:

“The easements and rights of way referred to by appellant are those of the Copper River Railway, as shown on the map attached to the complaint as an exhibit showing the townsite of Cordova. But this map also shows that, while the line of the railroad crosses a portion of the tide flats in front of the townsite of Cordova, there is a strip of upland owned by plaintiff lying between the line of the railroad's right of way and that portion of the shore in front of

which the defendant's wharf was being built at the time of the commencement of this action."

The decision was then based on the fact that plaintiff did have below the right of way in question and above mean high tide, a tract of land which yielded him the certain littoral rights which defendant was charged with obstructing.

II.

PRIVATE INDIVIDUAL NOT ENTITLED TO REDRESS AGAINST PUBLIC WRONG.

In the McCloskey case, this court said:

"One who has been divested of such littoral rights (by a street) cannot maintain a suit to enjoin obstruction to his access to navigable waters in front of his land, the case coming within the general rule that individuals are not entitled to redress against a public nuisance."

This rule applies to the case at bar.

29 *Cyc.* 1208;

29 *Cyc.*, 324;

Gould on Waters, Par. 122 and cases cited;

~~*Haggert vs. Stehlin*, 22 *L. R. A.*, 577;~~

People vs. Park & O. R. Co., 76 *Cal.*, 156.

If appellee could require the court to restrain appellant from maintaining a structure below Franklin street, appellant could likewise require the court to restrain appellee from erecting the proposed wharf at the same place. If not, why not?

III.

INDIAN TITLES NOT ALIENABLE.

The lower court held that appellee was the owner of the premises designated on Exhibit Y as Lot B and Lot 1, and designated on the map attached to the court's findings (p. 48) as Jimmie Bean Lot and Jimmie Johnson Lot, respectively, by means of deeds from certain Indians. (Ex. X and Z.)

It was alleged by appellee that two Indians, Jimmie Bean and Jimmie Johnson, were the owners of these tracts and in possession thereof until after the street in question was constructed and until the deeds were executed in 1913 (pp. 12 to 15). This the lower court found to be true (pp. 44 and 45).

Even if this court finds a valid Indian title up to the time of the execution of the deeds, appellant contends those deeds operated simply as an abandonment of the premises to the government, and that therefore any rights to the premises which appellee can rely upon did not become effective till the Indians executed these abandonments. (23 Stat. L. 241)

The provision of Section 8 of the Act of 1884, under which it is claimed that plaintiff established ownership of certain land here in question, has already been quoted. This Act is called the Organic Act of Alaska and is the first one to establish any form of civil government for the Territory. The same section from which the quotation was taken cautiously concludes: "But nothing contained in this Act shall

be construed to put in force in said District the general land laws of the United States.” In course of subsequent years Congress has from time to time prescribed the terms on which “Indians and other persons” “may acquire title”, viz:

By the Act of March 3, 1891, the laws pertaining to townsites were extended to Alaska, (26 Stat. L. 1095; Chapter 561, Sec. 11). This court has held that thereafter the rights under the Act of 1884 became, on a townsite, merged in the rights under the said Act of March 3, 1891; or, that the latter right displaced the former.

McGrath vs. Valentine, 167 Fed., 473 (477).

By the same Act (Secs. 12 and 13 of the Act of March 3, 1891), the right was extended to citizens to obtain patent to lands occupied for trade and manufacturing purposes.

By the Act of May 14, 1898, (30 Stat. L. 409, Ch. 299), the homestead laws were extended to Alaska, but this was not effective in practice for the reason that the general homestead laws applied only to surveyed lands, and no surveys had been made in the Territory. By the Act of March 3, 1903, (32 Stat. L. 1028), an amendment was made to cure this defect. By Section 10 of the Act of May 14, 1898, it was further provided:

“That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the waterfront of any stream, inlet, bay, or sea shore for landing

places for canoes and other crafts used by such natives.”

This bestows upon the Secretary the right to determine what lands the Indians should be left in possession of, and to that extent abrogates the law of 1884.

The final disposition of the subject, so far as the duties of Congress are concerned, is found in the Act of May 17, 1906, (34 Stat. L., 197), which provides:

“The Secretary of the Interior is hereby authorized and empowered, in his discretion, under such rules as he may prescribe, to allot not to exceed 160 acres of non-mineral land in the District of Alaska to any Indian or Eskimo, of full or mixed blood, who resides in and is a native of such District and who is the head of a family or is twenty-one years of age, and the land so allotted shall be deemed a homestead of the allottee and his heirs in perpetuity *and shall be inalienable and non-taxable* until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preferred right to secure by allotment the non-mineral land occupied by him, not exceeding 160 acres.”

It is obvious that Congress has at this time fully provided for the manner title may be acquired both by “Indians and other persons” to any land occupied under the law of May 17, 1884, or otherwise.

Is the protection of and promise by this law alienable by the Indians?

This question was answered in the negative most effectively by the distinguished Judge Wickersham in *United States vs Barrigan, et al.*, 2 Alaska Rep., 442-452. The court said:

“Such a rule would completely nullify the Act of Congress, or at least permit the Indian to do it, and thus leave him a prey to the very evil from which Congress intended to shield him. Congress alone has the right to dispose of the lands thus specially reserved *for his occupancy, and any attempt to procure him to abandon them is void.* He is a dependent ward of the government and his reserved lands are not subject to disposal or sale or abandonment by him.”

This language is quoted with approval by Honorable Clay Tallman, Commissioner of the General Land Office, in his letter of April 30, 1914, to the Register and Receiver at Juneau, Alaska, touching the application of patent by Dupont Powder Company, and also in his letter of April 23, 1915, to the same office, relative to the case of Johnston vs. Sheldon. In the last letter, after an exhaustive discussion of the authorities, the Commissioner says:

“Considering the proposition, on principle, and on the terms of the proviso itself, and in the light of the Russian-American Packing Company vs. U. S. (199 U. S., 570), in particular, this office is of the opinion that possessory claims under the provisions of the Act of May 17, 1884, are not transferable; that said proviso protects

only such persons as were in possession of lands at the date of said Act.”

In the Russian-American Packing Company case, the Supreme Court held:

“It is quite clear that this section simply recognizes the rights of such ‘Indians, or other persons’, as were in possession of lands at the time of the passage of the Act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress.”

The Court further asserted:

“This Act was intended merely as a preliminary to future legislation and for the temporary protection of Indians and other settlers.”

That the provision of the Act of 1884, above referred to, was only intended as a temporary arrangement to preserve the *status quo* of the Indians and others until the conditions of the then unknown country could be investigated and suitable legislation formulated, is brought out most forcibly by Section 12 of the same Act, which provides:

“That the Secretary of the Interior shall select two of the officers to be appointed under this Act, who, together with the Governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory; what lands, if any, should be reserved for their use; what provision shall be made for their education; what rights by occupation of settlers should be recognized; and all

other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed, when the land laws of the United States shall be extended to said District."

Obviously, the proviso of Section 8 was only a declaration that the situation with reference to public lands should remain in *status quo* until the investigation contemplated by Section 12 had resulted in more definite knowledge of the needs of the country. The subsequent legislation must be treated as displacing the *status quo* proviso and as not only prescribing but limiting the various methods by which land can be held and title obtained.

It will now be observed that none of these statutes render Indian titles alienable. On the contrary, the natives were treated as wards and are strictly prohibited from transferring their lands or allotments. There can be no doubt that possession under the law of 1884 may be converted into an Indian homestead under the Act of 1906. That is subsequently, in fact, provided for by that Act. If the latter is not alienable, it is difficult to see how the inchoate right to such homestead is subject to alienation.

In construing these statutes, it should be borne in mind that it always has been the policy of the government to protect the Indians in the possession of the soil by prohibiting them from transferring their allotments or reservations, and a divergence from that policy should be clearly expressed before the courts

will hold that it was intended. In this case the intent of Congress to adhere to the old policy is unmistakable, and the language of Judge Wickersham above quoted is directly to the point.

Appellee's Authorities.

Appellee relies upon the decision of this court in *Heckman vs. Sutter*, 119 Fed., 83. It will be observed that in that case both sides to the controversy evidently assumed that if the native in question had the rights contended for, his grantee stood in his shoes. The question here involved was not raised in that case, was not discussed by the court, and was not considered. The one and only question considered either by the court or the parties was the extent and character of the original Indian rights.

Moreover, the court cautiously observed that it ruled as it did because there had, at that time, been no "subsequent legislation" on the subject.

The effect of the departmental decisions is treated in the last subsection of the next chapter.

IV.

SIXTY FEET RESERVED FOR ROAD.

It does not seem possible for appellee at this time to lay claim to the upland by means of the General Grant lode location. Not only does appellee allege and the court find that at the time this claim was lo-

cated (in 1895, Ex. "H-1", p. 242) the premises were owned and in the possession of the Indians, but appellee introduced evidence showing that the claim was adjudged non-mineral by the Land Department (pp. 167 and 168). And followed that up by calling a mining engineer as a witness to prove the ground was non-mineral in fact (p. 176).

But if this attack upon "General Grant" is not sufficient to estop appellee from claiming title under the lode location, the fact that appellee located the premises as millsites and is now actually applying for patent to the ground as millsites, (pp. 154, 157, 160, 162, and 164, Ex. 7) should be an effectual estoppel of any claim to the premises under any mineral location. When application for patent is made for millsite, the rules of the department require that applicant swear and the surveyor certify that the land is essentially non-mineral. This having been done, the court will not allow appellee to claim the premises from the government as non-mineral and from the appellant as mineral ground.

The only possible title by which appellee can legally claim the premises is, then, under the millsite locations. But in Alaska millsite locations cannot be lawfully located within sixty feet of the beach, for the reason that the government has reserved for public road a strip of that width along all navigable waters in the Territory, except under mineral locations.

The Statutes.

In Section 10 of the Act of May 14, 1898, heretofore referred to, it is provided:

“Ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or not.”

If such right is reserved to the public it must be at the expense of the private upland owner.

And further on in the same section:

“A roadway sixty feet in width parallel to the shore line, as near as may be practicable, shall be reserved for the use of the public as a highway.”

This was immediately construed to apply to all public land grants in the Territory, and as such construction was supposed to materially hamper the development at Nome, where in 1899 the beach diggings were discovered, and the town built on the surf line, Congress relaxed the rule and in Section 26 of the Act of June 6, 1900, (31 Stat. L., 321, Carter's Code, p. 140), inserted this proviso, after extending the mining laws to tide lands:

“And the reservation of a roadway sixty feet wide under the tenth section of the act of May 14, 1898, entitled, ‘An Act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes,’ shall not apply to mineral lands or townsites.”

This declaration in 1900 that the reservation shall

not apply to mineral lands and townsites is tantamount to the declaration that it shall apply to all other lands. Whatever justification there originally might have been for a doubt as to whether the reserve applied to other grants than those provided for by the law of 1898 itself, this subsequent declaration by Congress should be conclusive for the courts.

On this subject the Supreme Court says:

“If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. * * * Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. * * * A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter.”

United States vs. Freeman, 3 Howard, 556 (11 L. Ed., 724).

“We have already said that the correctness of the original interpretation of the earlier Acts increasing pay was at least doubtful. Constructive allowances are not entitled to favor. And it is certain, though the allowances in question, so far as made prior to the Act of July, 1862, were confirmed by that Act, that its prohibition of that construction in future, as applied to the

Act of 1861, must be taken, at least, as a legislative disapproval of the construction itself. It cannot, then, be assumed, that when the Act of 1864 was passed, Congress intended that this disapproved construction should be applied to it."

United States vs. Gilmore, 8 Wallace, 330 (19 L. Ed., 396).

Justice Miller, sitting in Circuit Court, used the following language:

"While it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as Congress or any legislative body has a right to pass a law for the future that a statute shall be held to mean so and so, while it may not affect past transactions, it is the equivalent to the passage of a statute of that character for the future, and while it is not necessary for us to decide here whether that declaratory statute affect any contracts or transactions prior to its passage, it is sufficient to say that after its passage it became a part of the law of 1867, (the former enactment)."

Stebbins vs Commissioners, 4 Fed., 282.

The Supreme Court of Washington in a recent case said:

"The courts are not at liberty to speculate upon the intent of the statute where the legislature has put its own construction upon the statute by a later enactment."

State, ex rel., vs. Clausen, 116 Pac., 7 (10).

To the same effect, in substance, was held by the Supreme Court in a more recent decision, where it is said:

“The practical interpretation of an Act by the Secretary of the Interior, and by Congress in subsequent enactments, removes doubt as to original intent.”

Swigart vs. Baker, 229 U. S., 187; (57 L. Ed., 1143).

Millsites being restricted by law to non-mineral ground, it follows that the provision of the statute above referred to applies to them. This is the view taken by the Department of the Interior, whose special duty it is to construe and apply these laws.

Alaska Copper Company, 32 L. D., 128 (131).

Alaska Mildred G. M. Co., 42 L. D., 255.

In the former case the Secretary said:

“By the tenth section of the Act of May 14, 1898, it is provided that ‘a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway,’ along all navigable streams, inlets, gulfs, bays and seashore in Alaska. Being non-mineral lands, these millsite claims do not fall within the exception of mineral lands from such reservation provided by Section 26 of the Act of June 6, 1900, and therefore their shoreward boundaries could not lawfully be laid within sixty feet of the water’s edge.”

That this is the correct view is affirmed by such

illustrious jurist as Mr. Curtis H. Lindley, leading counsel for appellee, who says:

“In Alaska the boundary line of a millsite cannot approach within sixty feet of tide water, i. e., the line of ordinary high tide.”

2 *Lindley on Mines*, No. 521, (p. 1177).

It must be taken as settled, therefore, that in front of the premises here in question the public had a right of way over a strip sixty feet wide along line of mean high tide. This was not only in the form of an easement, but was a reservation untainted by any right of private individuals.

The wisdom of Congress in thus conserving to the public a free access of navigable water is quite clearly illustrated in this case, where it is shown that appellee has endeavored to grasp and is claiming an exclusive right to some 8,000 or 9,000 continuous feet of the most available water front in Juneau and vicinity (p. 178). If a change in the policy of the Government with reference to this subject be thought advisable, let the change come through Congress.

Appellee's Authority.

This court, in *Dalton vs. Hazlet*, 182 *Fed.*, on page 571, expresses the opinion that the road reservation of the Act of 1898 applied only to the eighty rods reserved between land grants, and to nothing else.

In that case the court's attention had never been called to the proviso in Section 26 of the Act of 1900, which materially alters the situation, nor to the inter-

pretation of the two statutory provisos by the Department of the Interior in the case of Alaska Copper Company. This is the view taken of the Dalton case by the Secretary in *Alaska Mildred G. M. Co., supra*.

It is also obvious that the court's attention had not been called to the preceding proviso in the original section that, "ingress and egress shall be reserved to the public on the waters on all streams, whether navigable or not." Such right of ingress and egress by the public would seem to absolutely do away with private right of such access in Alaska.

The extreme caution with which Congress sought to preserve the shore for the use of the public is the predominating feature of this early enactment. This, perhaps, may be awkwardly expressed at times, and generally appears by parenthetical sentences evidently injected by way of amendments to the original bill, but the object, to give the public free access from the land to the water and from the water to the land, was never lost sight of, and that object should be borne in mind by the courts in giving effect to this and subsequent statutes.

Moreover, the court's interpretation of Section 10 of the Act of 1898, when carefully examined, is found to reduce the road reserve to a nullity. It is held that the statute of 1898 first reserves eighty rods between each grant on navigable waters, and over this reserve is another reserve of sixty feet for road,—a double reservation.

If the eighty rod tract is reserved, it would be un-

necessary to provide that some of it may be used for roads, because that right over all public lands has already been granted by Section 2477 R. S.

Even if this were not so, of what avail would it be to have a highway over every alternate eighty rod tract, if the right to continue the road over the adjoining tract did not exist? It is not thinkable that Congress intended to provide for roadways in segregate stubs of eighty rods each, as such would be of no use to the public.

It is incontrovertible, therefore, that the proviso as interpreted in the Dalton case renders it nugatory, but the court will not, except through inadvertence, hold a statutory enactment meaningless and to no purpose, and if this particular pronunciamiento is adhered to in the future, it will not only render nugatory the provisos of 1898, but also the very explicit statutory interpretation of that proviso in 1900.

While undoubtedly the language employed in 1898 might have been much clearer, when the court has the option between construing a statute to mean nothing and construing it to mean something, it will adopt the latter, unless such construction is clearly inconsistent with the language used or with the general purpose of the enactment. But if it be construed to mean something, it must be construed to mean what is here contended for it.

*Construction by Department Determinately
Persuasive.*

That the Land Department has encountered no difficulty at arriving at the latter view should have weight with this tribunal the same as it in the past has had weight with the Supreme Court:

“The construction placed upon a statute by the officers whose duty it is to execute it, is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.”

36 Cyc., 1140.

Jacobs vs. Prichard, 223 U. S., 200;

U. S. vs. Hammers, 221 U. S., 220;

U. S. vs. Cerecedo, etc., 209 U. S. 337;

U. S. vs. Finnell, 185 U. S., 236;

Hewitt vs. Schultz, 180 U. S., 139;

U. S. vs. Healey, 160 U. S., 136;

Railroad vs. Whitney, 132 U. S., 366;

U. S. vs. Moore, 95 U. S., 760.

In *U. S. vs. Moore, supra*, the court said:

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons

* * . The officers concerned are usually able men

and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *U. S. vs. Hammers, supra*, the court said:

"Conceding, then, that the statute is ambiguous, we must turn as a help to its meaning, indeed, in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed, have written them. At any rate, their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it *determinately* persuasive."

These observations apply equally to the subject discussed in the preceding chapter, where it was pointed out that the Department has held that Indian titles were non-alienable.

From what has been said, we deem it conclusive that, inasmuch as the appellee can be the owner of the upland only by reason of a millsite location, there is still a strip of ground next to navigable waters open to the public, and it is immaterial for the purpose of this case to determine whether such strip is in the nature of an easement only, or whether it is in the nature of an absolute reserve. Even if it be only an easement, the owner of the upland has no exclusive right of access to the ocean, for from a highway that right is a public right and not a private one.

THE STREET.

Even if it be conceded that appellee hold a fee title to the upland, unencumbered by any public easement on the beach line, it will probably be admitted that if Franklin street is a public thoroughfare the right of access thereto from the sea is a public and not a private right.

But it is insisted by counsel that the street is not legally established because it was laid out and constructed without the permission of appellee and without any condemnation proceedings.

To this argument appellant answers:

A. The street is at least a *de facto* highway and as such cannot be attacked collaterally and can be vacated only in a proceeding instituted for that purpose against the city.

B. The street was located prior to the millsites and over public land, and is valid under the provisions of Sec. 2477 Revised Statutes, authorizing highways to be located on public lands.

C. Whether the land was public or belonged to the Indians at the time the street was laid out is immaterial, as in either case the grantee of land takes the land subject to the burdens and servitude imposed upon it while belonging to the grantor.

D. Appellee and its alleged grantors having, without objection, allowed the city to expend the public funds in constructing this street, are estopped

from afterwards questioning its legality.

E. Even if appellee is not estopped by laches the courts will not vacate a public highway or other public utility at the request of the land owner where such public improvement might be lawfully established by the exercise of the power of eminent domain. In such cases the courts will refer the complainant to his right of action for damages, because that is all he could get even on condemnation proceedings.

These propositions will be discussed *sereatim*, but first let us examine the evidence bearing upon the establishment of this street.

On the map attached to plaintiff's complaint, this street is named "city street". On appellee's Exhibit Y, introduced by it in evidence, the street is also named "city street", and on the plat prepared and used by appellee in the patent proceedings, (Exhibit 7), the street is shown and designated as "government road".

That plat was prepared before the trial of this case, and at that time appellee treated the street as "legal". At no stage prior to the trial has the right of the public or the city in that street been questioned. The illegality of the structure is evidently an afterthought aroused by an emergency which became apparent during the trial. Appellee's witnesses also, throughout the trial, referred to the street in question as the "city road", "street", "plank road", etc., interchangeably.

And the lower court in his opinion (p. 66) said:

“In 1912 the city of Juneau planked over a strip ——— feet running in front of plaintiff’s upland. This suit was brought August 6, 1913. From 1912 to the last mentioned date the public have constantly used said street to such an extent that it has become one of the principal streets of the town. Plaintiff has never taken any steps to prevent the public from so using the ‘street’.”

The first step in the building of this thoroughfare was taken July 19, 1907, when the city passed an ordinance (Exhibit 9, p. 219) laying out the street and adopting the survey (Exhibit 10, p. 222).

The actual construction of the street in front of the premises here involved began June, 1912 (p. 109-191).

Prior to that time the ordinance and plat (Exhibits 9 and 10) had been lost from the city records and a new survey was made (p. 191). This last survey substantially followed the earlier survey, as will be seen by a comparison of the maps. (Exhibits 8 and 10).

The entire work was completed during the summer.

There was no objection made to this street, either by the appellee or its Indian predecessors. The city authorities had no reason to believe that it was less welcome than street improvements generally. Nor does the court find that any objection was made by

appellee or anybody else. The court simply finds that the appellee did not give its consent, but there is no other evidence to back up that assertion by the court than the mere statement of one of the witnesses that the permission of the appellee to build the street was not asked. The court, however, never found, as a fact, nor is there any evidence to indicate, that the Indians, who at the time the street was built, and for a year afterwards, occupied the premises in question, did not give their consent. The street has been used ever since as a public thoroughfare and is one of the best traveled highways in the city, affording an outlet to the Sheep Creek country, three and a half miles away, and now the center of operations of the famous Alaska Gastineau Mining Company and several other smaller concerns (p. 199), and is used by the appellee as well (p. 200).

A.

Highway Cannot Be Vacated on Collateral Attack.

A determinative feature of appellee's position is that it insists on receiving the benefits of the street without accepting the detriments. It leaves the roadway intact as a public thoroughfare but claims the right to invest it with legal characteristics foreign to public highways. Appellee yields to the city the right, and consequent duty, to maintain the street in a good, safe condition; yields to the public the right to use it; but claims for itself the sole right to pass from the street to the adjoining navigable waters.

It is perfectly apparent that appellee never intends directly to attack the validity of the street. It needs the street more than anybody else and could not get along without it. By making this collateral attack on the street it hopes to do what it neither would nor could do by direct attack,—it hopes to establish an anomalous highway which yields to appellee all the advantages without imposing any of the disadvantages of a public waterfront street.

And it is respectfully submitted that before appellee is authorized to question the legality of this street for any purpose its illegality should be settled by direct attack.

“A public highway when once established, whether through fraud or not, vests in the public and cannot be vacated except by direct proceeding to which the public is a party.”

Limming, et al., vs. Barnette, et al., 33 N. E., 1098, and cases cited therein.

In the case at bar the title to the street has vested in the city. Such title can not be affected by any judgments in this case. Nor should the appellant be required to defend the city's title. The fact that the street is built and operated by and in the possession of the city raises, on a proceeding of this kind, the conclusive presumption that it is lawfully established. Moreover, the presumption always prevails that, in absence of evidence to the contrary, public officials have done their duty, and that they obey the law. Even upon direct attack, in the absence of evi-

dence to the contrary, the presumption would prevail that the land owners (the Indians) gave their consent to the building of this street, or that if they did not, the legal requirements were complied with.

For the purpose of this case it is sufficient that the street is a *de facto* highway.

B.

Street Located Prior to Millsite.

The lode claims can not be considered, because appellee has proven and appellant admitted the ground is non-mineral, and, in the second place, was located at the time the premises here in question were the lawful property of certain Indians and not open to location by appellee's predecessor in interest. The only millsites involved are "A" and "U" millsites. The former was located in 1911 (Exhibit V). The latter was located in 1913 (Exhibit K-1), nearly a year after the street had been fully constructed.

The city established the site of the street by Ordinance 87 (Exhibit 9) and the survey (Exhibit 10) in 1907. At that time the land was public domain, (except for the inchoate right of the Indians).

Section 2477 Revised Statutes provides:

"The right of way for the construction of highways over public lands not reserved for public use is hereby granted."

When the city council located the road by the ordinance and survey of 1907, this grant was thereby accepted. Any act of legally constituted authorities

to definitely fix the locus of the road is sufficient under this section to establish it.

Wells vs. Pennington, 2 So. Dak., 1; 22 N. W., 305;

Walcott vs. Skauge, 6 No. Dak., 382;

Wallowa County vs. Wade, 43 Ore., 253; 72 Pac., 793;

Tholl vs. Koles, 65 Kan., 802; 70 Pac., 881;

Flint, etc., Ry Co., vs. Gordon, 41 Mich., 420.

Subsequent grantees take the land subject to such right of way.

McRose vs. Bottyer, 81 Calif., 122;

Estes etc. Road vs. Edwards, 3 Colo. App., 74;

Tholl vs. Koles, supra;

Wallowa County vs. Wade, supra;

Keen vs. Fairview, 8 So. Dak., 558; 67 N. W., 623.

In *Wells vs. Pennington, supra*, with reference to the territorial law declaring all section lines to be public roads, the court said:

“The Act of Congress giving right of way for construction of highways over public lands, and the territorial laws declaring all such lines, as far as practicable, to be public highways, and designing such highways to be sixty-six feet wide, are notice to all persons filing on public lands, subsequent to the passage of these laws, that they take them subject to the right of way for highway purposes, if such section lines are found practicable for that purpose.”

But even if we consider that at the time of the establishment of the street, either by the survey, the ordinance, or the actual construction, appellee had an inchoate right either by location or otherwise of millsites, this is not sufficient to withdraw the premises from the public domain to the extent of preventing the road being located. Not even the inchoate right of the Indians would prevent this.

Northern Pacific Ry. vs. Smith, 171 U. S., 260;

Frisbee vs. Whitney, 9 Wall., 187;

The Yosemite case, 15 Wall., 77;

Northern Pacific Ry. vs. Colburn, 164 U. S., 383;

Flint vs. Ry., 41 Mich., 420.

In *Northern Pacific Ry. vs. Smith*, *supra*, the court said:

“It has frequently been decided by this court that mere occupation and improvement on the public lands, with a view to preemption, do not confer the vested right in the land so occupied; that the power of Congress over public land, as conferred by the Constitution, can only be restrained by the courts in cases where the land has ceased to be Government property by reason of the right vested in some person or corporation; that such a vested right under the preemption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser.”

Inasmuch as appellee relies upon the millsite locations as giving it a right to the ground in question, let us examine the status of these locations in 1912, at the time the street was built. The "U" millsite had not yet been located. The "A" millsite was located in 1911 by marking the boundaries by appropriate corner posts; but millsites are not acquired by merely "locating" them on the ground. The only right to public land for millsite purposes is given by the Act of May 10, 1872, Section 2337, Revised Statutes. Under this section it is observed by Mr. Lindley:

"It will thus be observed that the law divides patentable millsites into two classes: (1) Such as are used and occupied by the proprietor of a vein or lode for mining or milling purposes; (2) Such as have thereon quartz-mills or reduction works, the ownership of which is disconnected with the ownership of a lode or vein."

2 *Lindley*, 520.

"The *mere location* of a millsite does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession *and use*."

2 *Lindley*, 521.

"Mere intention or purpose on a certain contingency of performing acts of use or operation thereon will not satisfy the law."

2 *Lindley*, 521

No claim is made here that "A" millsite was ever

occupied or used for mining or milling purposes prior to or even after the street was built. There is some evidence introduced intended to prove that appellee was in possession of the "A" millsite since 1911. One of the witnesses is Lenore, and another witness is Whalen. Both testified that appellee had been in possession of the group of millsites in the neighborhood of "A" millsite, numbering some ten or fifteen, but the nature and character of that possession is not explained. The testimony is but a legal conclusion and sets out no facts. Witness Bradley testified something about possession, but he confessed he did not come to Alaska till 1914 (p. 152). There is no evidence whatsoever, that any improvements have been erected upon the ground in question by appellee. Lenore testified that the last part of 1912 appellee commenced some work upon the premises, (meaning upon the group of millsites), (p. 163-4). This was, in the first place, *after* the street was built; and, in the second place, there is nothing to show that this work had anything to do with the use of the premises as a millsite; and, thirdly, there is nothing to show that any such work was done upon the "A" millsite, and this court will not hold that even if some work was commenced upon the *group* of millsites during the latter part of 1912, that that fact in itself gives any prior right in appellee to "A" millsite, or segregates the latter from the public domain. And in the fourth place, the allegation that appellee was in possession of the millsites at the particular place here in

question is refuted by the latter's own allegation and the court's finding that the Indians were in possession.

"As lands not mineral in character may be selected under various laws, the right to appropriate them for millsite purposes can not be exercised if any lawful possession is held by others."

2 *Lindley*, 521.

"Millsites cannot be taken and held for the purpose of maintaining boarding houses, stores, sawmills, residences or wharves."

2 *Lindley*, 523.

The Indians being, as appellee claims, in lawful possession until the deeds were executed by them to appellee in 1913, the millsite locations did not attach.

As for "U" millsite, it was located February 15, 1913, the year after the street was built (Ex. K-1, p. 244), and by reference to the location notice and the map attached to plaintiff's complaint (p. 25), it will be observed that it covers the greater part of the ground in dispute. Any right under this location is confessedly subsequent to the street.

C.

Appellee Took Premises Subject to Prior Servitude.

Assuming the land belonged to the Indians at the time the street was established, and assuming the court holds that the Indian rights were non-alienable, the Indian deeds amounted to an abandonment

or relinquishment. Between that abandonment and the attachment of appellee's rights there was a period at which the premises were public, at least hypothetically, during which period the rights of the city attached.

Maffet vs. Quine, 93 Fed., 347.

In this case, Judge Bellinger, under a similar state of facts, involving right of way for flume, said:

"There must have been an interval of time when the ownership was reinvested in the government of the United States, in order to enable them to be taken under the homestead laws, and at such time the preexisting appropriation and use would be as effective as if subsequently made, and when the title had so reinvested in the government."

2.

But assuming the court holds that the deeds from the Indians operated as a conveyance, this leaves appellee in no better position.

The actual construction of the street commenced in June, 1912, (p. 80, 109, 190). Immediately before that time several surveys had been made (p. 191). The first Indian deed, the deed from the Johnson family to Lot 1, was executed May 13, 1913 (Exhibit Z, p. 237), after the street had been open to traffic for nearly a year. The deed from Jimmie Bean to Lot B was executed still later, August 22, 1913 (Exhibit X, p. 231). The two Indian titles

here in question were therefore conveyed to appellee approximately one year after the street had been finished.

The law is well settled that a grantee of land takes the premises with whatever servitude is rightfully or wrongfully inflicted upon them during the ownership of his predecessor.

Roberts vs. Northern Pac. Ry., 158 U. S., 1;

Maffet vs. Quine, 93 Fed., 347;

Northern Pac. Ry. vs. Murray, 87 Fed., 648 (651).

In the Roberts case, Justice Shiras, on page 10, said:

“It is well settled that where a railroad company having the power of eminent domain has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burdens of the railroad.”

In *Maffet vs. Quine*, Judge Bellinger said:

“It is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner* of such land, a subsequent vendee of the latter takes the land subject to the burden thus placed upon it.”

If there be any merit in appellee's contention that the building of this street violated some rights of the

Indians, those Indians, under the decisions cited, may maintain an action for damages against the city and this is the only relief available.

D.

Appellee Estopped by Laches.

The court found that appellee did not consent to the construction of the street. But it is admitted that neither appellee nor its grantors objected. The street was apparently as welcome to the Alaska Juneau Gold Mining Company and to its Indian predecessors as new streets generally are to people interested in the neighborhood. It is admitted that appellee and its predecessors stood by and saw the public funds expended in building this street without uttering any form of a protest or without notifying the city authorities that the latter were intruding on private rights. The lower court defends appellee's unseemly behaviour in this respect, by arguing that it had no authority to start a law suit until it had actual use for such rights. This may be law, but it is not equity, and this is an equity case, and as such is an appeal to the conscience.

As to the Indians, they claimed the right to the beach and right of ingress and egress with their boats and canoes. They certainly can not offer the excuse that they had no right to object or protest when their ingress and egress was shut off by the street,—if, indeed, they considered their right of in-

gress and egress more valuable to their premises than the street itself, which is doubtful.

To stand by in silence and see the public money expended on this thoroughfare, reap the benefit of having a seemingly indispensable roadway constructed to and over its property, and then insist that the public have no rights there, is not coming into court with clean hands.

The appellee could not succeed in an action to enjoin the city from maintaining the street.

Roberts vs. Northern Pac. Ry., supra;
Northern Pac. Ry. vs. Smith, 171 U. S., 260;
United States vs. Lynah 199 U. S., 445;
Miocene Ditch Co. vs. Jacobsen, 146 Fed., 680;
McCauley vs. Western V. Ry. Co., 33 Vt., 311;
Dodd vs. St. Louis & H. Ry. Co., 108 Mo., 581;
Maffet vs. Quine, supra;
Cawley vs. City of Spokane, 99 Fed., 840;
Sherlock vs. Ry. Co., 150 Ind., 22.

In the Vermont case above quoted, the court in the course of the opinion said:

“In these great public works the shortest period of clear acquiescence so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in

operation, whereby the public acquire important interests in its continuance.”

In *Roberts vs. Northern Pac. Ry.*, *supra*, the court said:

“It has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road, without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages.”

In *Dodd vs. St. Louis & H. Ry. Co.*, the court said:

“It is clearly well settled that a party, who, with full knowledge, stands by and permits a company to spend large sums of money in the construction of a railroad through his land, without objection, forfeits his right of ejectment. This right is forfeited by virtue of the application of the doctrine of estoppel, as well as the *intervention of property interest*. Property in a railroad is peculiar. A railway may be likened to a chain, which is worthless with one link out. The ejectment of the company from a mile or half a mile of its track almost wholly destroys the value of its entire line.”

The laches of appellee in allowing the street without objection to be constructed and maintained has mislead appellant, to his injury, to believe that appellee had no littoral rights over the premises in question.

Appellant purchased the mill property from Alaska Supply Co., on the 24th day of March, 1913 (Ex. 3, p. 210). Mr. Worthen, the president and manager of the appellant company, was at that time a stranger in the country and when he arrived in Juneau Franklin Street was in use as a highway (pp. 92 and 200) and he had a right to assume and rely upon it that this street was invested with all the legal characteristics of any other public thoroughfare.

If the theory of the lower court be correct, a littoral owner may stand by in silence and see the public expend millions of dollars in public improvements, by way of streets, piers and wharves, and when it pleases him he may walk in and take possession of the whole works.

The cases cited in this and the succeeding chapter of this brief all involve direct attack upon the legality of the public utility in question. In the case at bar appellee evinces an intention to leave the street intact, but in its collateral attack attempts to have it declared illegal, without going to the trouble of making the city a party to the action.

E.

Element of Estoppel Not Necessary.

But though the courts have held that one, who, without protest, stands by and sees public money spent in construction of public utilities, does not come into court with clean hands when he afterwards asks for relief against these same improvements, the same courts also at the same time hold that laches is not in any way necessary to defeat such claim for relief. The courts uniformly go much further and hold that even if the street were constructed illegally,—yes, even if it had been constructed by force and over the land owner's objection, it would be no less a public highway and can not be closed by the courts.

Kamper vs. Chicago, 215 Fed., 706;
Osborne vs. Missouri Pac. Ry., 147 U. S., 248;
Doane vs. Ry., 165 Ill., 510; 46 N. E., 520;
Whittlesey vs. Hanford, 23 Conn., 421;
Johnson vs. Railways, 127 S. W., 63;
Griffin vs. Railway, 64 S. E., 16;
New York City vs. Pine, 185 U. S., 93;
McCullough vs. City of Denver, 39 Fed., 307;
McCarthy et al. vs. Bunker Hill & Sullivan,
 164 Fed., 927.

The court below in his opinion stated that these authorities were decided upon the principle of estoppel. It is evident he has not read them.

In *Kamper vs. Chicago*, *supra*, decided last spring, plaintiff sought mandatory injunction compelling the

city to remove a water conduit constructed through plaintiff's premises seventy feet below the surface and unknown to him or his predecessors in interest. There could be no element of estoppel present. The Circuit Court of Appeals, Seventh Circuit, through Judge Baker, summarized the legal authorities on the subject in the following language:

“When a public or quasi public corporation, having the delegated power of eminent domain, without condemnation proceedings, enters upon land (which the owner would be powerless to hold against appropriation for public use) and thereupon completes a public work and is using it in public service, the land owner will not be permitted, by ejectment or mandatory injunction, to retake possession and thus break in two a railroad or a water tunnel or other work which is being used as an entirety for the public good. This is so, not because equity refuses to frown upon unlawful seizure, but because equity will not tolerate a possessory demand being turned into a means of oppression and extortion, and because a consideration of the rights and convenience of the public outweighs the qualified possessory right of the owner,—a right he could not have absolutely maintained even initially as against the public use. And equity sufficiently indicates its disapproval of the wrongful taking by pointing the owner to the law courts, where his right to compensation can be determined.”

On the strength of this basic principle, Judge Hallett, in *McCullough vs. Denver, supra*, held that he was without jurisdiction to enjoin the maintenance of a water conduit, though it was laid by force of arms over the land owner's protest, and on the Sabbath, because it was a public utility and the defendant could ultimately acquire possession by right of eminent domain, and the plaintiff had remedy by action for damages,—which is all he could have gotten had the city originally proceeded lawfully. Where was the feature of estoppel in that case?

In *Osborne vs. Railway, supra*, plaintiff sought injunction against the building of a railway on a street in front of his premises. The bill was filed *several days* before the work commenced. The court directed it be dismissed without prejudice to complainant's rights to sue at law for the damages which it claimed to have suffered, and a decree to that effect was accordingly entered. There was no element of estoppel present in that case, but the court in the decree said:

“But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is in the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere.”

The opinion in *Maffet vs. Quine*, quoted heretofore, was still stronger.

The decision in *Doane vs. Railway, supra*, is an interesting and instructive discussion of this whole subject. In that case the owner of lots abutting on the street sought injunction against the building of an elevated railway in front of his premises, whereby the latter were irreparably and permanently injured. The structure was without authority in law and action was instituted before work had commenced and as soon as the intent of defendant became definitely known. There was no waiver, nor estoppel, nor laches. The relief prayed for was denied and plaintiff was referred to his right to sue for damages. The discussion is pertinent because the abutting owner on the street is in exactly the same position as abutting owner on navigable water; both abut on the public highway. The injury of both consists in being obstructed in their access to the highway in front of the premises.

In *Whittlesey vs. Hanford*, the records show that a railroad was built over land without consent of plaintiff, who was a part owner of the premises, and without condemnation proceedings or payment of damages. Relief was denied. The court said:

“He (plaintiff) now calls upon the court to enjoin the company against the use of their road over the land in which he had an interest, simply because that interest has not been taken legally. This cannot be done without great in-

jury to the company and serious loss and inconvenience to the public in being deprived of the railroad facilities furnished by the company. It probably would be more for their interest to pay the plaintiff ten fold or even one hundred fold the amount of his share of the damages, according to the assessment of the appraisers, than have their operations stopped in the manner prayed for in the bill.

“We will not say that the plaintiff in applying for an injunction intended thereby to take an undue advantage of the company and extort from them unreasonable damages as no such fact has been found. Yet, it is perfectly obvious that a decree to that effect would place the company in a situation in which they must either submit to such terms as plaintiff might exact, or to great loss and damage in their business.”

If the foregoing decisions are to be considered authoritative by this court, it is obvious that in a direct proceeding against the city the land owner could not succeed in having the street closed in front of his premises, for the reason that the city has the power of eminent domain, which it could exercise at any time, and that under the law all that the land owner would be entitled to, in the first place, would be damages, and these he could recover in an action at law, even at the present time.

The only question which remains under this heading is whether or not the city of Juneau has the power of eminent domain. This, however, is not debatable. (Sections 627 and 633, Compiled Laws of Alaska).

And this court has held that the city may condemn rights to the tide lands.

Ashby vs. City of Juneau, 174 Fed., 737.

It must be obvious, also, that if the appellee could not succeed upon a direct attack in closing the street, were he the littoral owner, he should not be permitted to succeed on a collateral attack in getting a decree that the street is not a public thoroughfare. The street being open to the public and no rights intervening between it and tide waters, which latter are also a public highway, the public had full right to pass from the one highway to the other highway, and appellee's right in that respect is no greater than that of the public. The right which appellee claims as the foundation of this action is therefore a public right. Interference with that right is a public nuisance and not a private nuisance, and can be enjoined only at the instance of the public, through the proper officials.

VI.

RIGHT TO WHARF OUT.

The object of this action is expressed by witness Bradley, the superintendent of appellee company, on page 146, in the following language:

“We will establish a wharf there for the receiving of coal, and on this wharf would be built coal bunkers.”

This proposed wharf was then marked on the map (Ex. Y, p. 236) by this witness (p. 150).

The court finds as a fact that appellee intends to build such a wharf (pp. 46 and 48). And as a conclusion of law (p. 51) it is found that appellee is entitled to an injunction restraining appellant from maintaining any possession which would interfere with the construction of this wharf.

It will be observed that the lower court in his opinion maintained that the upland owner has an absolute and vested right as littoral owner to erect wharves from the upland, over tide lands and into deep water in front of his premises. In this, as has been already remarked, the lower court confounded the right of ingress and egress with the right to erect wharves.

It will not be disputed that the navigable waters of the sea extend to mean high tide. Nor that navigable water up to mean high tide is a public highway. Nor that the title to and ownership of the soil under the water is in the government.

Shively vs. Bowlby, 152 U. S., 1;

Weber vs. State Harbor Commissioners, 85 U. S., 57;

Ferry Pass Inspectors et cetra Ass'n. vs White River Inspectors et cetra Ass'n., 22 L. R. A., (N. S.) 345;

McCloskey vs. Pacific Coast, 160 Fed., 794.

In the *McCloskey* case, this court said:

“There can be no doubt, therefore, that the appellee, while it had *not* the right to wharf out on the tide lands in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at all points in front thereof.”

In *Weber vs. State Harbor Commissioners*, Justice Field said:

“By that law (the common law) the title to the shore of the sea and of the arms of the sea and in the soils under tide waters is in England in the King, and in this country in the State. Any erection thereon, without license, is therefore deemed an encroachment upon the property of the sovereign, or as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise.”

In that case Justice Field referred to statutes and “immemorial usage” as establishing a different rule, but it is evident that by “immemorial usage” he had in mind the laws and the usages of Rhode Island and

Connecticut subsequently discussed by Justice Gray in *Shively vs. Bowlby*, where this subject is exhaustively discussed and finally settled. Said the Supreme Court in the latter case:

“By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King’s, is a purpresture and may, at the suit of the King, either be demolished or be seized and rented for his benefit, if it is not a nuisance to navigation.”

Referring to a recent decision by the House of Lords, the court further said:

“The right thus recognized, however, is not a title in the soil below high water mark, *nor a right to build thereon*, but a right of access only, analagous to that of an abutter on a highway.”

To this doctrine of the common law, the Supreme Court in the *Shively* case expressly gave its assent and affirmed that the rule was the same in the United States. Accordingly, it was held that the State might convey by deed the title to the soil below mean high tide line, and under such conveyance the grantee had a right to shut off the upland owner from access to navigable waters in front of his premises. This is not only the rule of the Supreme Court of the United States, but of most of the courts throughout the country.

Henry Dalton & Sons Co. vs. City of Oakland,
143 Pac., 721;

Ferry Pass Inspectors et cetra Ass'n. vs. White River Inspectors et cetra Ass'n., 22 L. R. A., (N. S.) 345;
Turner vs. People's Ferry Co., 21 Fed., 90;
Gould vs. Hudson River R. R. Co., 6 N. Y., 522;
People vs. Vanderbilt, 26 N. Y., 287;
People vs. New York & S. I. Ferry C.o., 68 N. Y., 71;
Hoboken vs. Penn. Ry. Co., 124 U. S., 656;
Ravenswood vs. Fleming, 46 Am. Rep., 485 (499).

In the most recent decision on this subject is found a most lucid resume of the law by Chief Justice Whitfield of the Supreme Court of Florida, where, among other things, it is said:

“In the absence of a valid grant from the State, no riparian owner or other person has an exclusive right to do business upon public waters of the State, whether such waters are in front of the land of the riparian owner or not.”

Ferry Pass Inspectors, supra.

Nearly twenty years prior to the decision of *Shively vs. Bowlby*, the Supreme Court passed upon the very question here under discussion, in *Atlee vs. Northwestern U. P. Co.*, 88 U. S., 389, where it is said by Justice Miller:

“He (defendant) rests his defense solely on the ground that at any place where a riparian owner can make such a structure useful to his

personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and his own convenience, project the pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway on the channel unobstructed. *No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness."*

Congress, by the River and Harbor Act, has prescribed the rules and conditions under which a littoral owner may wharf out.

6 *Federal Stat. Ann.*, 813 et seq;

30 *Stat. L.*, 1151.

Under these enactments the appellee, even were it the littoral owner, had no right to wharf out without having first obtained the permission of the Secretary of War, in the manner provided by statute. To do so would be a criminal offense.

The decision of the lower court amounts to a license extended to appellee to violate the laws of the nation which, by the Act of July 27, 1868, (Ch. 273 S. I. Vol. 15, Stat. L., p. 240) were made applicable to Alaska.

Appellee's Authorities.

The lower court based his decision of this question on the early cases of *Yates vs. Milwaukee* and *Dutton vs. Strong*. These cases have been frequently referred to by the Supreme Court in subsequent de-

cisions and are explained and modified in their applications by that court in *Shively vs. Bowlby*, as well as in other cases from the same tribunal.

The Dutton case is discussed on page 37 and the Yates case on page 39 of 152 United States Reports. These cases were again discussed and explained by the same tribunal in the still more recent case of *Scranton vs. Wheeler*, 179 U. S., 141, where Justice Harlan, on page 158, refers to and distinguishes the Yates case, *inter alias*, in the following language:

“The decision in *Yates vs. Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had, *in conformity with law*, erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence, and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching the navigable water.”

The Dutton case was interpreted in the following language by Justice Gray, in *Shively vs. Bowlby*:

“The only point adjudged was that, the plaintiff’s vessel, having been wrongfully attached

to the pier, the defendants, after she had been requested and had refused to leave, had the right to cut her loose, if necessary to preserve the pier from destruction or injury. There can be no doubt of the correctness of that decision; for, even if the pier had been unlawfully erected by the defendants as against the State, the plaintiffs had no right to pull it down or injure it, and upon the facts of the case were mere trespassers upon the defendant's possession."

Unfortunately, however, this court in the Dalton case quotes as authoritative certain obiter and thoroughly repudiated expressions of the Supreme Court in the Dutton case, expressions which, since the decision of the Shively case, are no longer authoritative, if they ever were; and which, in addition thereto, were obiter even to the decision of the case in which they were used. Nevertheless, they have lent color to appellee's contentions and have formed the basis of the opinion of the lower court. It will also be observed that the very language used in the Yates case, which the Supreme Court has repudiated repeatedly, is quoted and relied upon by the lower court as the law.

In spite of the language used, this court did not, in the Dalton case, decide that the littoral owner had an absolute and vested right to wharf out, but simply that he had a right to have obstruction of his access to navigable water enjoined. Everything said beyond that is purely obiter.

The confusion found in the books at times on this subject arises from the statutory provisions enacted in the various localities touching title to tide flats and the right to wharf out, and to careless language at times used *arguendo* by courts.

The doctrine of the lower court that the littoral owner had the absolute right to construct wharves over tide lands to deep water, irrespective of any statute permitting it, is in direct conflict with the doctrine that navigable waters are public highways clear up to line of mean high tide, which latter is too well established to need extended remark.

VII.

PRIOR POSSESSION PROTECTS APPELLANT.

Throughout the trial of this case could be heard the persistent blare about appellee's ponderous millions. It was like the constant rumble of overhead thunder. The dollar sign was plastered over everything. Counsel talked about the millions invested and the millions to be invested as if he expected everybody to be stricken with paralysis at the astonishing figures. His swaggering refrain has found its way even into the opinion of the lower court.

But legal rights will not be measured by the size of bank accounts. If appellee is in law entitled to the property in question, this judgment should be affirmed; if not, it should be reversed, though the Alaska Juneau Gold Mining Company overstride the world like a colossus.

Nor will the fact that a litigant is only a squatter on the public domain, whether above or below tide line, render him, under the law, subject to any bully who may want to elbow him off the earth. Mere possession is sufficient to protect him against one who has no better title. From times immemorial squatters on the public domain of the United States have enjoyed the same protection from the courts as if they were owners, except as against the Government. The courts will even entertain actions in ejectment to recover a mere squatter's possession illegally lost.

Haws vs. Mining Co., 160 U. S., 303 (317);

Sabariego vs. Maverick, 124, U. S., 261 (299);

Oregon Ry. & Nav. Co. vs. Hertzberg, 37 Pac. 1019 (1021);

Hammond vs. Shephard, 57 N. E., 867.

The evidence shows that the sawmill here in question was established in 1902. It is situated partly above and partly below line of mean high tide, as will be seen from the original blueprint, Exhibit 8, attached to the transcript. It was stipulated that the so-called "Warner" line of mean high tide was the correct line (pp. 168-9). On the printed copy of this exhibit, (p. 218), this line has become obliterated.

On the tide flats and in the adjoining waters a booming ground was established. This took place in 1902 and continued ever after. There was no evidence that appellee thought of the beach till in 1913 (p. 107).

During 1912, the Alaska Supply Company, then the owner of the mill, extended the line of dolphins on the outer side of the booming ground, and also set a row of piles on the shore side thereof and where the street was later built. In the spring of 1913, commencing in March, the piles were driven for the platform on the lower side of the street (pp. 92-95) and appellant continued the work of perfecting the platform until enjoined by the court in this action (pp. 92-95 and 110-111).

Meanwhile, and during the previous years, appellant and its grantor had been in full, exclusive, peaceful possession. The premises were especially adapted for this purpose and the court's decision puts appellant out of business (p. 199). It is shown that for the enjoyment of this upland below the street on which the mill is built, the latter must have unobstructed use of the waters to the southeast along the shore, for the floating of the logs. It is therefore suffering a special, private injury by having that part of the navigable waters obstructed by appellee's proposed wharf.

The Government has as good right to give away the tide land as it has to give away the upland; and if it sees fit to leave a citizen in the unobstructed possession of the tide lands, no private individual is in position to molest him. Appellant must, therefore, be treated in this case as being lawfully on the premises until it is established that appellee has better legal right thereto. The decision of the court in this

case has the effect of enjoining appellant out of possession and enjoining appellee into possession of the premises.

It is respectfully submitted that the judgment herein should be reversed and the appellee directed to restore the appellant to that full possession of the tide lands and adjoining waters which it had prior to judgment, the learned court below having refused a supersedeas.

Respectfully submitted,

JOHN RUSTGARD,

Attorney for Appellant.

No. 2640.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WORTHEN LUMBER MILLS, a Corporation,
vs. Appellant,

ALASKA JUNEAU GOLD MINING COMPANY, a
Corporation, Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee.
CURTIS H. LINDLEY,
Of Counsel.

Filed this.....day of October, 1915.

....., Clerk.
By....., Deputy Clerk.

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BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

STATEMENT OF FACTS.

This suit was brought to enjoin the driving of piles and the construction of a platform designed for use in piling lumber on the tide flats lying on the shore of Gastineau Channel, near Juneau, Alaska.

The appellee is the owner of a large quartz mine situated about four miles inland from the shore of

Gastineau Channel, in the immediate vicinity of Juneau, Alaska. This mine has been operated for many years. Until recently, however, these operations were carried on with a view largely of exploring and developing the ore bodies. In the year 1909, the work of development and exploration had been carried to such an extent as to warrant the erection of a large milling plant. Accordingly, steps were taken at that time looking toward the installation of such a plant.

Climatic and operating conditions make it imperative that these large milling plants used in connection with the crushing of low grade ores mined and milled in Alaska should be built at tidewater. This for many reasons which readily suggest themselves, but more especially to secure cheap transportation, without which low grade mining cannot be carried on. These circumstances led to the purchase by the appellee of the Abe Lincoln and General Grant lode mining claims situated on the shore of Gastineau Channel, immediately south of the City of Juneau.

These claims had been located at an early date and were at one time the property of the J. P. Jorgenson Company, W. W. Casey, John Reck and W. J. Hills. While the claims were so owned, the first named, J. P. Jorgenson Company, conveyed its interest to its co-owners, reserving to itself, however, a strip of water front extending along the shore of Gastineau Channel in front of the claims for a distance of one thousand feet, and particularly described in the deed

of conveyance. Its co-owners at the same time conveyed to it their interest in the strip of water front just mentioned. These conveyances were executed in the year 1902, and immediately thereafter, the J. P. Jorgenson Company, commenced the erection of a sawmill upon the thousand foot strip of water front so reserved by it. The sawmill, so constructed, was operated by the J. P. Jorgenson Company for several years. In about the year 1910, the name of the Company was changed to the Alaska Supply Company, but the operation of the mill was continued by the same corporation under its new name until the year 1913, when the Worthen Lumber Mills, the appellant, became its successor in interest.

In the meantime the title to the Abe Lincoln and General Grant lode claims had become vested by mesne conveyances in John Reck and one Henry Shattuck, the latter having also become the principal stockholder and the president of the J. P. Jorgenson Company, the name of which had been changed to that of Alaska Supply Company.

In August, of the year 1911, while Henry Shattuck stood in this relation to the Alaska Supply Company, the appellee purchased from him and his co-owner, John Reck, the General Grant claim, it being the claim which embraces within its boundaries the upland lying above the tide land in dispute. Shortly prior to this, however, the claim purchased had been declared to be non-mineral in character by the Land

Department in proceedings before that tribunal upon an application for patent previously made. Accordingly the appellee, in addition to acquiring the interests of the former owners, also caused a group of millsites to be located for it, covering the ground embraced within the claims. The "A" Millsite, one of the group so located, and the millsite within the boundaries of which practically all the upland lying above the tide land in controversy is embraced, was located during the year 1911. The "U" Millsite, designed to cover a small fraction, and embracing within its boundaries a few feet of the upland lying above the tide land in dispute, was located by the appellee about two years later.

At the time of the purchase of the General Grant claim by the appellee and at the time of the location of the millsites, certain Indians named Jimmie Bean and Jimmie Johnson, respectively, claimed a possessory right under the Act of May, 1884, to two adjoining tracts embracing the uplands lying above the tide lands in controversy, and also the tide lands themselves. The right and title of both of these Indians, to both uplands and the tide lands, were also purchased by the appellee and conveyed to it by deed.

A small plat showing the relative positions of all the tracts referred to with reference to the tide land in dispute is embodied in the findings of the lower court, and is contained in the record at page 48.

The area so acquired by the appellee and em-

braced within the Abe Lincoln and General Grant claims and the group of millsites and Indian tracts which cover practically the same ground covered by the mining claims, constitutes the site for appellee's large milling plant, the first unit of which now under construction is to have a capacity of eight thousand tons per day, to which is to be added another unit, bringing the total milling capacity of the plant when completed up to twelve thousand tons per day. Work looking towards the erection of this plant was commenced on this site in the summer of 1911, and was carried on continuously ever since, a sum in excess of one million dollars having been expended in that connection. (See Evidence Bradley, Record, p. 140, *et seq.* Evidence Lindsay, Record, p. 174, and Evidence Wayland, Record, p. 177.)

In the summer of 1912, while the appellee was carrying on active construction work on its millsites, the city of Juneau built a plank roadway over the tide flats, then occupied and claimed by appellee's Indian grantors, in front of the "A" and "U" millsites, in such a manner as not to interfere with or cut off access to deep water. (See Finding of the Court, No. 9, Record, p. 50. Evidence Bradley, Record, p. 202.)

This roadway was constructed by the city without obtaining any right or title to the ground over which the roadway was constructed, from the appellee or any one else, and without obtaining any permission what-

soever to construct the roadway. (See Finding No. 9, Record, p. 50, and Evidence Bell, Record, p. 192.) The roadway was not built along the line of ordinary high tide, but was built over the beach a considerable distance below the ordinary line of high tide, so that the roadway did not embrace within its boundaries any of the upland lying along the shore. (See Finding No. 9, Record, p. 50, and plat forming part of the finding of the Court, occurring on page 48 of the Record. Also stipulation occurring on page 169, Alaska Juneau Company, Exhibit "Y".)

In the year 1912, also, the Alaska Supply Company, then under the management of Mr. Henry Shattuck, who had in the previous year conveyed the General Grant lode claim to the appellee, extended its log boom beyond the one thousand foot reservation by driving ten piles, driven in pairs, so as to form five dolphins approximately fifty feet apart. During the same year also, the Alaska Supply Company drove seventeen piles, approximately along the line of the street constructed during the same summer. (See Evidence Webster, Record, p. 84, *et seq.*) Up to this time no piles of any character had been driven on the tide lands in dispute. (See Evidence Webster, Record, p. 84 *et seq.*)

During the following year, a few days prior to the commencement of this suit, the appellant commenced to drive piles and lay a platform along the outer edge of the road previously built by the city, with the

view of providing itself with a place to store and pile its lumber. Shortly after this work was commenced and before it had progressed very far, this suit was brought to enjoin the appellant. A temporary injunction was asked for and granted, and upon the trial the same was made permanent, it being shown that plaintiff was the owner of the upland and had acquired from the Indians their possessory title to the tide land claimed under the Act of May 17, 1884, and was carrying on operations of such a nature that access to deep water was required along the entire strip of four hundred feet in dispute in order to land supplies and other materials, that the construction of a wharf over the shoal water lying between the upland and the deep water of Gastineau Channel was necessary in this connection, and further, that the platform about to be constructed by the appellant would cut off this access to the deep water of Gastineau Channel. From the decree granting this injunction the appeal was taken to this court.

APPELLANT'S EXCEPTIONS.

At the outset it is to be observed that the exceptions taken to the findings of fact and conclusions of law sought to be reviewed by this appeal, do not in any case point out the reason for the making of the objection or the taking of the exception. The language of

the exceptions appearing on pages 209-210 of the Record is as follows:

“Defendant also duly excepted to each of the third and fourth findings of fact filed herein and to the following portion of the Court’s Finding No. 2, to wit: (Then follows a portion of Finding No. 2).

“Defendant also excepted to that portion of the Court’s Finding No. 2, reading as follows, to wit: (Then follows a further portion of Finding No. 2).

“Defendant also excepted to that portion of the Court’s Finding No. 9, reading as follows, to wit: (Then follows a portion of Finding No. 9).

“Defendant also excepted to each of the Court’s conclusions of law.

“Defendant also excepted to the decree entered herein.”

As a general proposition, findings of the lower court will not be disturbed on review where there is any evidence to support them. See

Empire State-Idaho M. & D. Co. v. Bunker Hill O’Sullivan M. & C. Co., 114 Fed., 417;
Los Angeles Gas & Elec. Corp. v. Western Gas Constr. Co., 205 Fed., 707-714.

Under the Act of April 28, 1915, enacted by the Territorial Legislature of Alaska, findings of fact in equity cases are made reviewable, but they are reviewable only when proper exceptions have been taken. The act provides:

“But such findings of fact and conclusions of law shall be separate from the judgment and shall be

filed with the clerk and shall be incorporated in and constitute a part of the judgment roll of the case, and such findings of fact shall be subject to review by the appellant tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court and also to the findings of fact and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days before the entering of the decree, or such further time as the Court may allow."

It will be seen therefore that while the action of the court in making findings is made reviewable, it is reviewable only when exceptions are taken to the findings and a statement of such exceptions is prepared and settled as in the act provided.

Only rulings upon matters of law when properly presented in a bill of exceptions can be considered here in addition to the question where the findings are special whether the facts found are sufficient to sustain the decree of the court. The mere statement that the party excepts to a finding is not sufficient. The object of an objection and an exception is to call the attention of the trial judge to the alleged error in order that he may, if an error has been committed, upon his attention being specially directed to it, correct the error. It is for this reason that only those things which were objected to at the trial and duly excepted to can be reviewed on appeal. To state merely that a finding is excepted to does not direct

the court to the error, if any, but merely advises the court that the party excepting is not satisfied with the finding. This the court would assume to be the fact without such exception if the finding were adverse to the party seeking to take the exception. This matter has been frequently passed upon by both State and Federal courts.

Webb v. National Bank of Republic, 146 Fed., 717-719.

Exception here was as follows:

"To each, all and every of said findings, conclusions and judgments the plaintiffs and each of them at the time except."

The court in holding this exception invalid, speaking through Judge Sanborn, said:

"The purpose and office of an exception is to sharply call the attention of the trial court and opposing counsel, to the specific ruling or finding challenged, to the end that the Court may at once correct it if it is erroneous. An exception which does not give this notice of the specific error claimed, utterly fails to perform its function and is futile. The exception here is of this nature."

Collier v. Erwin, 2 Mont., 335-336:

The exception here was general, being "to the findings of the court." The court held this open to two objections:

1. The exception was general to all the findings,

so if any one was correct, the exception would have to be overruled;

2. The exception did not specifically point out wherein the findings were erroneous.

With reference to the second objection, the court say:

"It may also be observed that an exception to a finding of fact should point out specifically wherein the finding is erroneous. This exception has no pretention of this kind."

Benefiel v. Aughe, 93 Ind., 401, 403:

The exception was in the following terms:

"The defendants object to the findings and the decree herein."

It was held that this objection was too general to present any question and, quoting from a previous decision by the same court, *State v. Swarts*, 9 Ind., 221, it was said:

"A general objection, either to finding or to verdict, without stating why, amounts to nothing."

Schmitt v. Miller, 22 Mich., 278-279:

The exception here was as follows:

"The said plaintiff, by her attorney, hereby files in said cause her exception to the findings, decision and judgment of Hon. Charles R. Brown, the Circuit Judge, who tried the above cause."

In deciding that under this exception the court could not inquire as to whether there was evidence to support the finding, the court say:

“As to the first question, there was no such sufficient objection as would be sufficient to present it.”

Hunter v. Manhattan Ry. Co., 36 N. E., 400, 401:

The exception to the findings in this case was as follows:

“To the third finding of fact and separately to so much thereof as finds that plaintiff ever took from her co-tenant an assignment for valuable consideration of any rights of action as herein stated.”

In holding that in this form of exception no question is presented which is subject to review, the Supreme Court of New York say:

“The exception is too general to be available in the present manner. The finding is very comprehensive as to facts and their legal effects, and the exception fails even to suggest the defect in proof now relied upon.”

Paggeot v. Sexton, 23 Wis., 195, 196:

The exception in this case was in the following language:

“The plaintiffs except to each and every finding of fact and facts in said written finding of the judge contained.”

In passing upon its sufficiency the court say:

“Within the decisions both of this court and the court of New York, such an exception amounts to nothing.”

It was urged in this case that there was a distinction between law and equity cases in this regard, but the court held that no such distinction existed.

APPELLANT'S BRIEF.

The various propositions referred to in appellant's brief will be discussed in the order in which they occur.

A discussion of considerable length relating to appellee's title is indulged in by counsel for appellant under the head “Appellee's Title.”

While this portion of counsel's brief may be very interesting, the discussion is entirely academic, for clearly, if the plaintiff has a good title to the upland in question, it becomes quite immaterial from what source this title is derived.

When the appellee's present millsite was selected by it as the site upon which to construct its milling plant the ground was covered by two lode locations, the Abe Lincoln and the General Grant, the portion of the millsite lying above the tide land in dispute being covered by the General Grant. Negotiations were had looking toward the purchase of these claims and while these negotiations were pending, the claims were declared non-mineral by the Department. (See

Evidence Reck, p. 168.) The appellee, however, purchased the claims and paid the claimants for them. At the same time a group of millsites were so located by the appellee as to embrace this same area. That done, it was found that certain Indians laid claim to portions of land along the beach and embraced within the lode claims and the millsites and also to the tide land lying in front thereof. Thereupon the claims of these Indians were purchased and paid for by the appellee.

It was shown upon the trial and found by the court that appellee commenced construction work on its millsite in the summer of 1911. Counsel is in error on page 10 of the brief in asserting that the "A" Millsite was not actually occupied for millsite purposes till after the street was built in the year 1912. The testimony is that work was commenced on this entire group in 1911, and that the work so commenced was carried on continuously ever since. (See Evidence Bradley, Record, p. 140 *et seq.*; Evidence Lindsay, Record, p. 174, and Evidence Wayland, Record, p. 177.)

The testimony with reference to the Indian title is entirely undisputed, and is to the effect that prior to and on May 17, 1884, two Indians named Jimmie Bean and Jimmie Johnson occupied two separate tracts lying side by side and so situated as to embrace all the upland lying above the tide land in dispute, and that in addition to this, the Indians named occupied

and used the tide lands in front of their uplands in connection with the landing of canoes and other water craft, having improved the same by removing the boulders so as to make them available for this purpose. These Indians, according to the testimony, occupied an asserted claim to these uplands and tide lands from a time prior to the Act of 1884 up to the time that they disposed of their holdings to appellee. (See Finding No. 4, Record, p. 44; Evidence Fannie Johnson, Record, p. 133; Evidence Jimmie Johnson, Record, p. 129; Evidence St. Clair Johnson, Record, p. 112; Evidence Tom Johnson, Record, p. 124.)

Appellant's counsel, on page 10 of the brief, under the head "Indian Title," says that he is disposed to accept the consequences of the finding in relation thereto, and to treat it as binding upon this appeal. But whether this is to be construed as an admission that the finding is correct or not is not important in view of the fact that the evidence upon the matter referred to is uncontradicted and is clear and unqualified. It becomes immaterial, therefore, to further inquire into the sources of appellee's title, since it cannot be denied that it has a good title, arising from one of three sources. The contention of counsel that the Indian rights under the Act of 1884 are not assignable will be referred to later when that question is specifically taken up and the other contentions enumerated in the statement of facts by appellant's counsel will be treated in the same manner.

We will next proceed to reply to the argument contained in appellant's brief, taking up each subdivision in its order.

I.

Under the title, "The Street Cuts Off Littoral Rights," appellant's counsel endeavors to show that the plank street or walk extending over the tide flats in front of plaintiff's upland deprives plaintiff of its right of access to the deep water of Gastineau Channel.

The right of access to deep water is a right that inures to the benefit of the rightful possessor of uplands, who is given this right in order that he may be enabled to reach the navigable waterway from the uplands in his possession. The upland owner or possessor has this right of access regardless of the extent of his upland holdings. He may have a large area of land lying back from the shore, or he may be possessed only of a very narrow strip. If the land borders upon the water's edge; that is to say, if his land is bounded by the line of ordinary high tide he is in possession and occupancy of the upland, and because of this is entitled to have access to the navigable waters lying in front of him. If a city, county or municipality acquire the right to construct, and maintain a highway along the shore, such city, county or municipality will, upon construction and maintenance of such highway, become the upland possessor or owner. It will possess the land that borders on the navigable water and the

person owning land above such highway will cease to be the littoral owner. He will no longer have possession of lands that border upon the line of mean high tide. The right of possession of the land so situated will be in the owner of the street or highway, and the owner of such street or highway will, because of the ownership of the street which embraces the upland, have the same rights of access to the navigable waters lying in front of such upland that the owner of any other species of upland has. The right of the public when entitled to the use or possession of a street or highway bordering upon navigable water to free and unobstructed access to such navigable water rests upon the same foundation that the right of any other upland owner rests. When a street is properly and rightfully laid out and maintained along the shore of a navigable body of water, it will be assumed that the object in laying it out along the shore of such navigable body of water was to secure to the public the right of access, but this right itself does not depend upon any peculiar property that exists in the street or highway, but it finds its origin in the fact that the public so having the right of possession to the upland has the right of access to the waters lying in front of such upland for the same reason that any individual having the same right of possession to the upland would have the same right of access.

It was so held by this court in the case of

McCloskey v. Pacific Coast Company, 160 Fed.,
794.

There can be no doubt of the correctness of the decision of this court in that case. However, the rule that the public as the possessor of a street extending along the shore becomes vested with the right of littoral holders has no application to the facts in the case at bar, for the following reasons, namely:

First: The city of Juneau laid out and constructed the street or plank roadway without acquiring the right so to do from any one and without regard to the rights of the upland owners and possessors:

Second: The street as constructed is wholly on the tide flats, the uppermost side of the same being several feet below the line of mean high tide, so that the city as the possessor of the street is not in possession of any of the upland, i. e. is not a littoral holder:

Third: The street was constructed in front of plaintiff's upland upon the tide flats in such a manner as not to interfere with plaintiff's access to deep water, but rather to facilitate such access.

In regard to the first proposition, the lower court found that the plaintiff did not consent to or give the city any right whatsoever to construct said road, but that the same was constructed without consulting the

plaintiff. This finding of the lower court is amply supported by the testimony. The witness Bell testified that the plank road or street in question was constructed by the city in the year 1912; that during that year he was a member of the city council; that the city council at that time had two surveys made, one along the tide flats, and one further up over the upland, but concluded to build the street over the tide flats because it could be more cheaply constructed along that line. That the street was constructed without any reference to any previous survey or any ordinance previously passed and without any negotiations with the Alaska-Juneau Gold Mining Company, and without any permission whatsoever from said company. In fact the witness testified that the city had no agreement with any one, that the street was simply built without discussing the matter at all. (See evidence Bell, Rec., pp. 191, 192, 193). Clearly a municipality has no right arbitrarily, without any process of ceremony and without compensation, to deprive an upland owner of his right of access to deep water, a property right which is as sacred as any other.

McCloskey v. Pacific Coast Company, 160 Fed., 794;

Yates v. Milwaukee, 10 Wallace, 504.

In the former case this court very carefully inquired into the question of whether the city had a legal right

to maintain the street before deciding that the Pacific Coast Company had ceased to be a littoral owner because of its existence so that the littoral right of access belonged to the public and not to the Pacific Coast Company. This court clearly deemed that question to be one that must first be decided in favor of the public before it would be accorded the rights of littoral holders as the possessor of the street.

According to the facts in the latter case, one Yates had built a wharf extending into the Milwaukee River. The city of Milwaukee had declared the same a nuisance and was proceeding to tear it down in connection with work done by it in dredging the river and widening its channel. Yates brought suit to enjoin the city. The court held that Yates as the riparian holder, had a right to build a wharf, and that the city had no right to condemn it or tear it down without compensation. The court say:

“But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among those rights are, access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be

arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

In relation to the second proposition that the street as constructed is wholly on the tide flats, the lower court found as follows:

"The Court further finds that in the year 1912, and while the plaintiff was the owner of the upland lying between the lower or southerly end of the Jorgensen thousand-foot reservation and the Alaska Juneau wharf, the City of Juneau constructed a plank roadway over the tide-lands lying in front of plaintiff's said upland, having an approximate width of twenty feet; that said roadway was built on piles and not along the line of mean high tide, but wholly over the beach or shore land several feet below the line of ordinary high tide" (see Finding No. 9, pp. 49-50).

The correctness of the Court's finding in this regard is not challenged. It was stipulated upon the trial that the line of ordinary high tide was correctly shown on Alaska Juneau Company's Exhibit Y (See Rec., p. 169), and Exhibit Y shows the line of ordinary high tide in front of the upland lying above the tide land in dispute, as being a considerable distance above the street. This being true, the city, even though in rightful possession of the street, would nevertheless not be an upland or littoral owner or possessor, a littoral owner or possessor being one whose lands border upon

navigable water. The plaintiff was as much a littoral owner and possessor after the construction of the street as it was before the street was constructed. The placing of the street along the tide flats did not deprive the plaintiff of the possession of the land, the lower boundary of which was Gastineau Channel. In building the street, the city merely placed the structure on the tide land in front of the littoral owner's land, a structure which, as we shall hereafter see, would be ordered removed at the suit of the appellee if it interfered with the littoral possessor's right of access, otherwise not.

This precise point was before the Supreme Court of the United States, in the case of

Illinois Central Ry. Co., v. Illinois, 146 U. S., 387.

This case arose in the state of Illinois. The city of Chicago was the owner in fee simple of a street lying along the shore of Lake Michigan. The street was so situated upon the upland that its lower boundary was the line of ordinary high water. The city had, by ordinance, given the Illinois Central Railroad Company the right to fill in the lake along the shore between the street so owned and held by the city and deep water, so as to reclaim a tract 300 feet in width and extending to a point indicated in the ordinance. This strip had been filled in and was occupied by the railroad company in connection with the laying

and maintenance of its tracks and other appliances. The railroad company laid claim not only to the 300 foot strip lying in front of the city's upland holdings, but also the right to extend out to deep water from the seaward side of this strip. It claimed this right not only because of the city ordinance but also because of a grant by the legislature, which had been subsequently revoked, the suit involving among other things the railroad company's right to maintain structures to the seaward of the 300 foot strip, and the court held that the railroad company did not have the right to maintain its improvements either under the grant from the legislature or under the grant from the city council, that under the laws of Illinois, the city council had the power to give the railroad company the right to fill in and use the strip 300 feet wide along the water front, but that notwithstanding the fact that the city council had such power and the further fact that the railroad company had exercised the right granted by the city council and had filled in the ground and had occupied the same, the city, being the owner of the street along the shore in fee simple, was vested with all the rights of a riparian proprietor and was not divested of those rights by reason of the fact that the shore had been filled in and occupied by the railroad company under the ordinance. It was accordingly held that the right of the city to wharf out to deep water beyond the strip that had been filled it remained and continued to exist

notwithstanding the ordinance and the occupancy of the strip thereunder by the railroad company. In the course of the opinion, the court say:

“The construction of a pier, or the extension of any land in the navigable waters for a railroad or other purposes by one not the owner of lands on the shore does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. These rights are incident to riparian ownership; they exist with such ownership and pass with the transfer of the land, and the land must not only be contiguous to water but in contact with it. Proximity without contact is insufficient. The riparian right attaches to the land on the border of navigable water without any declaration to that effect from the former owner, and its description in a conveyance by him would be surplusage.”

Applying the law as laid down by the Supreme Court in this case to the facts in the case at bar, we have this situation. Here the appellee occupies the same position that the city of Chicago did in the case under discussion. There the city of Chicago owned the fee to the upland because of its ownership in fee of the street which bordered on ordinary high water. Here the appellee owns the upland because of its ownership of the land which is bounded by ordinary high water. There, the railroad company, under a grant from the city itself, occupied a strip 300 feet in width between the upland and deep water. Here, the city, without any grant or right from the upland

owner (the appellee) occupies a strip 20 feet in width between the appellee's upland and deep water. The appellant occupies the same position that the Illinois Central R. R. Company did in the case under discussion, except that the Illinois Central R. R. Company occupied the 300 foot strip originally because of the grant to it by the city, while in the case at bar, the city is possessed of a strip 20 feet wide without any grant or right. Except for this last mentioned feature, the cases are parallel. Yet the Supreme Court held that the grant to the Illinois Central R. R. Company, followed by its occupancy of the 300 foot strip granted, did not deprive the city as the shore owner, of its right to wharf out and have access to the deep waters of the Lake, giving as a reason therefor,

“That the construction of a pier or the extension of any land in the navigable waters for a railroad or other purposes by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. These rights (say the court) are incident to riparian ownership.”

The railroad company in that case was not the riparian owner, but the mere occupant of land between the upland and deep water; so the city in this case is not the riparian owner or holder, but the mere occupant of a strip of tide flat between the upland and deep water.

The city, in that case, was the owner of the upland bordering on the navigable waters, and as such had the right of access to deep water and the rights incident thereto, including the right to wharf out. The appellee in this case is the owner of the upland and because of this is entitled to the same rights that the city of Chicago as the owner of the upland was held to be entitled to by the court, and the views expressed by the Supreme Court in that case are in entire harmony with the decision of this court in the case of *McCloskey v. Pacific Coast Co.*, 160 Fed., 794. In that case the Pacific Coast Co. was denied the right of access to deep water because it was not the littoral owner, since the street followed the shore in such a way as to occupy five feet of the upland above ordinary high water mark. This of course made the owner of the street the littoral proprietor and holder, while in the case just discussed the city of Chicago remained the littoral proprietor, notwithstanding the occupation of a strip of land lying below ordinary high water by the railroad company, and while in the case at bar the appellee now is and remained the littoral owner and holder notwithstanding the existence of the plank roadway or street over the tide flat in front of its upland holdings.

This matter is referred to in the opinion of this

court in the case of *McCloskey v. Pacific Coast Co.*, at page 797, where the court say:

“But we do not find that the appellee is in fact a littoral owner”

With reference to the third reason urged why the existence of this plank road or street does not interfere with appellee's right of access, the court held as follows:

“That the construction and maintenance of said street does not, and never did, interfere with any of the plaintiff's rights, and that it is so constructed that the plaintiff can wharf out and have access to deep water, notwithstanding said plank road” (See Finding No. 9, Rec., p. 50).

This finding is based upon the uncontradicted testimony of the witness P. R. Bradley (Rec., p. 202).

In view of the fact that the street or roadway does not now, and never did, interfere with plaintiff's access to deep water, appellee can not now, nor could it at any time, maintain a suit to enjoin the city from maintaining the street in its present position, nor could it have prevailed in a suit against the city brought to prevent the construction of such a street or roadway.

Courts will not enjoin the construction and maintenance on every kind of structure on the tide flats at the suit of the upland owner. The upland owner's right consists of the right of access to deep water, and

unless this right is interfered with by the maintenance of a structure on the tide flats in front of him, he has no right to complain. It was so held by this Court in the case of *Decker v. Pacific Coast Co.*, 164 Fed., 974.

It is difficult to see, therefore, how the appellee could lose its right of access from its upland because of the construction of a street by the city without its consent under circumstances such that the appellee was powerless to prevent the construction of said street.

Barron v. Alexander, 206 Fed., 272;
Decker v. Pacific Coast Co., 164 Fed., 974;
Columbia Canning Co. v. Hampton, 161 Fed.,
 60.

It is not necessary to argue that the city could not commence the construction of a roadway on the tide flats in front of appellee's upland in such a way that if appellee brought suit to enjoin such work of construction, it would be a perfect defense to say that the appellee's right of access was not interfered with, and that therefore it had no cause of action, and then upon completion of the work open up the street or highway and say to appellee, now, notwithstanding the fact that you could not prevent the construction of this roadway or highway, because it is so constructed that your access is not interfered with, you now have lost your right to avail yourself of this access entirely, because

the public now has that right from the street, and any trespasser may construct a wharf to the seaward of this street, and in an action brought by you to enjoin the construction thereof, it will be a perfect defense to show that the city constructed the street over the tide flats in front of your property without your consent, without giving you any compensation, and under such circumstances that you could not have brought a suit to enjoin such work of construction. To state this proposition is to refute it.

II.

Under subdivision II, counsel discusses the proposition that a private individual is not entitled to redress against a public wrong. As a general proposition this may be conceded, although it has no application whatsoever to the case at bar.

Counsel in his brief asks why appellant would not have the same right to restrain the appellee from constructing a wharf that the appellee has to restrain appellant? The answer is that aside from the fact that the appellee has succeeded to the possessory rights of the Indian grantors to the tide lands, appellee is a littoral holder who has, because of its littoral occupancy and ownership, the right of access to the navigable waters lying in front of its upland, and because of this is entitled to an injunction against any one interfering with or obstructing its access. The appellant on the other hand, is a naked trespasser, whose

predecessors in interest conveyed by deed the upland above the tide land in dispute to the grantors of the appellee, and who is now, without any claim of right, attempting to cut off the access to deep water so conveyed to appellee's grantor as an appurtenance to the upland, by endeavoring to take advantage of the act of the city of Juneau in attempting to construct a street or roadway over the tide flats without first obtaining the right to do so.

III.

Under the heading "Indian Titles Not Alienable," counsel indulges in a discussion to show that the possessory rights held under the Act of May 17, 1884, can not be alienated.

At the outset it must be noted that possessory rights under the Act of May 17, 1884, are not Indian titles. While in this case, it is true that the grantors of the appellee were Indians, the rights conveyed would have been the same if the grantors had been of the white race, provided of course that they had, like the Indians referred to, occupied and claimed the ground prior to and since the enactment of the Act of May 17th, 1884. That act provides, among other things:

"That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The meaning of this language is readily understood when read in the light of current history. Prior to the 17th of May, 1884, all lands in Alaska were public, the property of the United States, and no law had ever been enacted under which title to any kind of land could be acquired in the Territory. From the earliest times, both Indians and whites had settled upon the public lands of the United States and had occupied certain portions of them for a variety of purposes. At the time of the passage of the Act in 1884, there were in Alaska not only a number of Indian settlers of this character, but a large number of whites had domicile there, settling here and there, and occupying such portions of the public domain as they required in order to carry on their respective pursuits.

While there was not at such time a law under which title to the tracts so settled upon could be acquired, the settlers occupied these lands with the tacit consent of the United States, in the same manner and under the same circumstances that the early settlers in California and other western states occupied, appropriated and improved the public domain. The titles of these early settlers to the extent of the land actually occupied, possessed and claimed by them were always regarded as valid as against any person whatsoever excepting the United States. The rights acquired under such possession were looked upon in the same manner as were other property rights. The courts protected

the possession of the first-comer and appropriator, and it was uniformly held that the possessor of these tracts throughout the entire West, whether in Alaska, California, or some other locality along the Pacific Coast, could maintain ejectment against an intruder; that these possessory titles could be conveyed by deed, pass by descent, and in fact had all the qualities of a fee simple title as against every person whatsoever except the United States.

When the Act of 1884 was passed, the mining laws were extended to Alaska. If Congress had stopped here, there would be nothing to prevent a discoverer of mineral upon land previously occupied by another, whether such other were an Indian or a white person, from locating the same, and by connecting himself with the paramount title of the United States, dispossess the earlier settler and deprive him of the rights he had acquired with the tacit consent of the United States. Obviously this would work an injustice. Accordingly a proviso was inserted in the act, providing:

“That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

The proviso just quoted did not confer upon either the Indians or other persons in possession of lands in Alaska any new rights, but merely protected and recognized the rights previously acquired by the tacit consent of the United States. The operation and effect of the proviso, to all intents and purposes, is like that of the mining law passed in 1866. This law conferred no new rights upon the miners in California and other western states, but merely recognized the rights previously acquired. So likewise the proviso in the act under discussion did not grant to those early settlers any new rights, but merely recognized the rights they already had, and protected them against intrusion by others, it being at the time provided that the terms under which such settlers might acquire title were reserved for future legislation by Congress.

Prior to the enactment of May 17, 1884, the possessory rights of these various occupants and claimants were freely transferred by deed, and the right of an occupant of the land on the public domain to alienate his possessory right was never questioned. The object of Congress in inserting the proviso above referred to in the Act of 1884 was not to limit, qualify or curtail the rights of those occupants, but to protect them and to recognize them. It was a mere recognition of pre-existing rights, and one of those pre-existing rights was the right of the possessory claimant to alienate his possessory title. This right to alienate a possessory

title claimed under the Act of 1884 was recognized by this court on two separate occasions.

Heckman v. Sutter, 119 Fed., 83; and
McCloskey v. Pacific Coast Co., 160 Fed., 794.

In the case of *Heckman v. Sutter*, an Indian named Charles Dickson had settled upon and had occupied certain upland and used the tide land in front thereof prior to and on the 17th day of May, 1884. In the year 1888, the Indian, Dickson, sold to one Barry his possessory right, and Barry afterwards sold to Sutter. On appeal, this Court held that Sutter, as the successor in interest of the original Indian, Charles Dickson, had the right of occupancy not only to the upland settled upon by Dickson, but also because of his use and occupancy thereof, to the tide land lying in front thereof.

In the course of the opinion, the Court, in discussing the proviso above quoted, uses this language:

"The prohibition contained in the Act of 1884 against the disturbance of the use or possession by any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high water mark, nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands of whatsoever character, by means of which they eked out their hard and precarious existence."

In the case of *McCloskey v. Pacific Coast Co.*, one Murray, a white man, had located and claimed title to the lands in dispute in that case, prior to and on the 17th of May, 1884. The possessory right of Murray had been subsequently acquired by the Pacific Coast Co., and the Court held that his successor was entitled to the use and occupation of the ground originally located and claimed by Murray, including both upland and the tide land.

The contention of counsel that because Congress subsequently passed a number of laws under which title to various kinds of land in Alaska may be acquired, the right recognized by the Act of 1884 became extinguished is without merit. Even though the Indian claimant, or his successor, might have acquired title under one or the other of these various acts, the fact remains that it has not yet been done, and since it has not been done the acts do not affect the right in question.

In the case of *Valentine v. McGrath*, cited by counsel, the title under the Act of 1884 had become merged in the title afterwards acquired from the government under the Town Site Act. Entry had actually been made and the land patented to the trustee, who, in turn, had conveyed the tracts to the various possessors and occupants under the terms of the Town Site Act. Of course the occupant who had been in possession prior to 1884 stood in no different position under those circumstances from any other occupant, and the trus-

tee conveyed to him the land he occupied. This was all he was entitled to. In this case, the land is still unpatented, and is still held under the possessory title recognized by the Act of 1884.

There has been no specific legislation by Congress providing a method whereby title can be acquired to the lands possessed and occupied at the time of the Act of 1884, and the protection granted by that Act has never been withdrawn. This same matter was considered by this court in *Heckman v. Sutter* and *McCloskey v. Pacific Coast Co.*

In the case of *Heckman v. Sutter*, this Court used the following language:

“There has been no future legislation by Congress that applies to the present case, for this case involved no question of purchase and entry, and concerns only the right of occupancy and use of certain of the lands of the United States.”

In the case of *McCloskey v. Pacific Coast Co.*, this court used the following language:

“There has been no subsequent legislation affecting the right of possession so recognized, and the protection thus afforded by the statute has not yet been withdrawn. The appellee having the right of possession of the tide land between the roadway and the line of low tide could protect his possession by any appropriate suit or action.”

The contention of counsel that because an Indian claiming under an Indian Allotment cannot alienate the land so held by him, he shall not be allowed to

alienate the land held by him under the Act of 1884, is without force. The reason an Indian cannot alienate land held by him under the Act of Congress providing for Indian allotments is found in the fact that that Act expressly provides that land so held cannot be alienated. He is granted merely a qualified ownership. No such proviso is contained in the Act of 1884.

A homestead claimant likewise cannot alienate his homestead rights prior to patent for the reason that the homestead laws so provide, and for no other reason.

Counsel contends that the Indian grantors of the appellee might have applied to have those lands set aside for them as Indian allotments, and that if they had so applied and the lands had been so set aside, the lands could not be alienated. The answer to that contention is, that the Indians did not apply to have these lands set aside as Indian allotments, and therefore do not come under the statute pertaining to Indian allotments, but, on the contrary, continued to hold the land as occupants and possessors under the Act of 1884, which places no restriction on the right of the Indians or other persons to alienate their possessory rights, but was a mere recognition of their then existing possessory right, to which was attached the right of alienation regardless of whether the land claimed and possessed was claimed and possessed by an Indian or other person.

Surely it cannot be contended that if an Indian

should purchase a town lot from a white man, or some other tract of real estate, he would not be able thereafter to again alienate the land so purchased, but would be compelled to hold the same in perpetuity.

It is needless, however, to extend the discussion upon this subject any further in view of the fact that the Indian's right to alienate his possessory right was recognized by this Court in the case of *Heckman v. Sutter*, and was placed upon the same footing with the white man's right in that regard as it existed under the facts in the case of *McCloskey v. Pacific Coast Co.*

Many persons and corporations residing and doing business in Alaska have acquired the rights of early settlers, both Indians and whites. The propriety and correctness of this court's decisions in that regard never having been questioned, it would be a very serious matter if these titles should now be held invalid nor, as we have seen, would there be any reason for such a course. The decisions of this court upon the matter are based upon a correct and accurate understanding of conditions that existed in the Territory at the time the Act was passed, and give to the Act under discussion the effect that Congress intended it should have.

Nor does the case decided by Judge Wickersham and reported in 2nd Alaska, p. 442, and relied upon by counsel, hold anything to the contrary. In that case it was held that the contracts for the purchase of

the lands occupied by the Indians were without consideration and were obtained by fraud. The opinion upon that question reads as follows:

"The defendants also rely upon the bona fides of their contracts with the Indians, but the evidence shows that the contracts were obtained without consideration and under circumstances which clearly show that the Indians did not understand or appreciate their force and effect."

The opinion then contains the voluntary statement by Judge Wickersham that he cannot bring himself to agree with the ruling in the case of *Sutter v. Heckman*, and in that connection he uses the language quoted by counsel in his brief. Surely the statement of Judge Wickersham that he cannot bring himself to agree with the decision in *Sutter v. Heckman* can not be regarded as a very serious reflection upon the correctness of that decision.

IV.

In subdivision IV, under the head of "60 Feet Reserved for Road," it is contended by counsel for appellant, that in no case can littoral rights attach to a millsite located in Alaska, for the reason that Section 10 of the Act of 1898 provides as follows:

"Provided further, that there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and

that the Secretary of the Interior may grant the use of such reserved lands abutting on the waterfront to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings at reasonable rates of toll to be prescribed by said Secretary and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway."

It is not necessary at this time to enter into an extended discussion with reference to the proper construction to be placed upon the language of this statute, for the reason that this court, in the case of *Dalton v. Hazelet*, has already held that the last clause in the section relating to a roadway, reserved a roadway only through the reserved lands; that is to say, the eighty foot tracts reserved by the provisions of the Act. Upon that subject, this court after quoting the provisions of the Act, say:

"The last clause above quoted refers to a roadway through the reserved lands previously described and not through lands granted in fee simple under the homestead laws."

Notwithstanding the severe criticism of counsel, it is only necessary to read the proviso itself in order to become convinced that this court could reach no other conclusion without doing violence to the lan-

guage employed. The proviso deals only with reserved strips, providing in the first instance that such strips shall be reserved, and secondly, how they may be leased and disposed of, and thirdly, for the reservation of a sixty foot roadway. Millsites are not mentioned, nor referred to, and the provision in the proviso for the sixty foot roadway could not be extended to millsites without judicial legislation.

The contention of counsel that, under the decision of court, one reservation is created within and over another, is without force. The proviso provides that any citizen or citizens, or any corporation, may be granted the use of such reserved strips by the Secretary of the Interior. Then follow the conditions under which the Secretary may grant such persons or corporations the use of such strips. One is that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll to be prescribed by said Secretary; the other is that a roadway sixty feet in width, parallel to the shore line, as near as may be practical, shall be reserved for the use of the public as a highway.

This reservation for a roadway, like the provision that the public shall have proper use of the wharves erected at reasonable rates, does not take effect until the Secretary has granted the use of the strips to a person or corporation under the terms of the proviso. It merely limits the power of the Secretary in leasing these reserved strips. If these reservations were not

contained in the proviso, the Secretary might lease these reservations unconditionally, but under the terms of the proviso the lease must be subject to these two conditions; first, wharves built out from the shore within these reserved areas must be open to the public upon the payment of reasonable tolls; second, a roadway sixty feet in width parallel with the shore line as near as may be practicable, shall be reserved for the use of the public.

In discussing the decision in the case of *Dalton v. Hazelet*, counsel seems to take it for granted that the attention of this court was never called to the provision in the Act of 1898 which provides that ingress and egress shall be reserved to the public on the waters of all streams whether navigable or not, nor to the Act of June, 1900, providing:

“And the reservation of a roadway sixty feet wide under the tenth section of the Act of 1898, ‘an act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes,’ shall not apply to mineral lands or townsites.”

With reference to the first provision, it is but necessary to say that ingress and egress are reserved on the waters of streams only. Ingress and egress are not by this provision reserved to and from the shore of the ocean and its arms. Gastineau Channel is not a stream, but an arm of the Pacific Ocean. Nor does the provision say that ingress and egress shall be

reserved from the shore of the stream to the stream itself, but on the waters of the stream, not to the waters of the stream.

The object of the provision clearly is merely to reserve to miners and prospectors the right to go up the streams in the Territory regardless of whether they are navigable in fact or not. It is a matter of common knowledge that those streams are used frequently as the highways from the shore to the interior, not only when they are navigable in fact, but also when they are in fact not navigable, since they furnish an easy passage through the timbered sections and a uniform grade up the mountain sides.

With reference to the Act of June, 1900, it is only necessary to say that the fact that Congress passed an Act stating that the provisions with reference to roadway should not apply to mineral lands or townsites is not tantamount to saying, as counsel urges, that such roadways shall affect all lands except mineral lands and townsites. It must be borne in mind that mining claims can be located over the eighty rod reserves, and the provision of the act merely has the effect of doing away with the sixty foot roadway in those cases where mineral lands are found within the eighty rod reserves and there located. The Department at one time held that the reserve of eighty rods must also be left between mineral claims, but these decisions of the Department were overruled by the Secretary himself, so that now all are agreed that

the eighty rod reservations have no application to mineral lands. This being the case, mineral lands could be located within the reserves, and in order to free them from the burden of the conditions contained in section ten with reference to the sixty foot roadway, it was necessary that Congress should pass the Act in question.

The same applies to townsites. These can be located within the eighty rod reservations and for obvious reasons should not be burdened with the sixty-foot roadway.

Again: Millsites are located and patented under the mining laws and, while they are non-mineral in character, are dealt with and disposed of under the laws relating to mineral lands.

The Department has held, and very properly so, that millsites are not subject to the provisions for an eighty rod reservation along the shore, being dealt with in that regard as are mining claims. And since every consideration that would lead Congress to exempt mining claims so located from the operation of the provision with reference to the sixty foot roadway would apply with equal force to millsites, there is every reason why millsites should be regarded as mineral lands as the term mineral lands is used by Congress in the Act in question.

However this may be, since these Congressional enactments were passed some ten years prior to the rendition of the decision in the case of *Dalton v. Hazelet*,

it is idle to say that their effect was not fully considered by this Court in rendering that decision.

Counsel relies upon and cites two decisions by the Department of the Interior, to wit, the case of the *Alaska Copper Company*, 32 L. D., 128, and the case of the *Alaska Mildred G. M. Co.*, 42 L. D., 255.

In the first of these cases it was held that millsites could not extend to the line of ordinary high tide, but that a strip of sixty feet in width must be reserved between their lower boundary and the line of ordinary high water.

The second decision reversed the first in this regard and held that a millsite might extend to ordinary high water mark, but that the public would have an easement sixty feet in width over the same as nearly parallel with the shore as might be practicable.

The first of these decisions was by the Acting Secretary, and the second by the Assistant Secretary. While the Assistant Secretary in the second decision criticizes the decision of this Court in the case of *Dalton v. Hazelet*, he reverses the action of the Acting Secretary in the former decision, and there is no reason why the next Assistant or Acting Secretary to whose attention this matter may be brought should not reverse the action of the Assistant Secretary in the second decision and render a decision in accordance with the case of *Dalton v. Hazelet*. The reason why the Assistant Secretary criticizes the case of *Dalton v. Hazelet* is that if the roadway were re-

served on the reserved eighty rod strips only it would not be a continuous roadway, but he loses sight of the fact that in any event Congress has enacted that this roadway shall not extend in front of mineral lands and townsites, so that whatever the decision might be the roadway would not be continuous, but would be interrupted by mineral lands and townsites. This reasoning therefore, loses all of its force. Nor would any one at all familiar with the conditions existing in Alaska ever suppose that Congress ever intended to reserve a roadway along the many thousands of miles of water front in that Territory. It would not only prove a serious handicap to mining operations in the Territory, but if rigidly insisted upon would in many cases stop those operations entirely, especially so, if the contention of counsel should be granted, that this roadway cut off all littoral rights. Mining in Alaska is carried on on a very large scale. The ore is exceedingly low grade, so much so that it cannot be mined at all unless the cost of mining and milling is reduced to a minimum.

For reasons that are obvious to any one at all familiar with these operations, the milling plants operated in connection with this class of mining must be built on the seashore and free access must be had to the waters of the ocean in order to furnish cheap transportation and supply these immense plants with a natural dumping ground. Without the enjoyment of all the rights of littoral proprietors these conveniences

could not be had, for however valueless the water front in front of a millsite might be at the time of its location, the construction of a milling plant of the character and size now being operated and constructed in Alaska immediately gives to this water front a new value because of its proximity to such plant. (This is amply illustrated by the case at bar, where the water front in question had no practical value until the operations of the appellee were commenced.) Because of the proximity of the tide lands to these plants, trespassers from every direction would immediately build wharves and otherwise settle upon the water front lying in front of the millsites and make it impossible for the operators of the milling plants either to have access for the purpose of handling their product and their supplies or for the purpose of disposing of their tailings and waste matter. It is a fortunate thing for the Territory of Alaska indeed that the language of the Act of Congress in question is such as it was construed to be by this court in *Dalton v. Hazelet*,

It is earnestly contended by counsel that these decisions of the Department of the Interior should control the decisions of this court. It is true that when an Act of the legislature is before the court for the first time for its consideration, the construction placed upon the Act by officers acting under it is entitled to consideration, but when an Act has once been construed by the courts the case is very different. It is then the duty of the officers to follow the construc-

tion placed upon the language by the court, and not the duty of the court to be bound and guided by the construction placed upon the language by such officers.

There is, however, another matter that presents itself in this connection. Even though all that counsel contends for were correct, even though the roadway were reserved for a width of sixty feet in accordance with the provisions of this proviso over millsites located on the shore of the sea,—the conclusions drawn by counsel would not follow. Under the decision of the Department in the case of *Alaska Mildred G. M. Co.*, the roadway is a mere easement and land is patented to the millsite claimant to the water's edge. But counsel will contend that even if the roadway is an easement, the public, as the possessor of the roadway, in the enjoyment of its right of access, has the right to wharf out.

This contention might have some force if the roadway were on the upland bounded by the line of ordinary high tide, but the roadway reserved under this proviso is not necessarily a roadway along the shore bounded by the line of ordinary high tide. It is a roadway sixty feet in width, parallel to the shore, as near as may be practicable. Now a roadway may be parallel to the shore and be a long distance away from it. Again it may not be practicable to place the roadway any where near the shore. It may be necessary, as it is in many places, to go up the mountainside to build the roadway.

The evidence in this case is, that the city of Juneau, in laying out the roadway, made two surveys, one over the tide flats and one over the upland and found that the roadway over the upland was not practicable. There is no evidence that it would be practicable to run the roadway along the shore over the uplands covered by A Millsite. Even though it should be conceded, therefore, that a reservation exists across the A Millsite to the extent that the public have an easement for a roadway sixty feet in width across the same, there is nothing to show that the public will, when it selects its site for a roadway, so construct it that its lowermost boundary will be the line of ordinary high tide. It may not be practicable to so construct it, and it may be constructed further up on the mountain side so that the appellee, as the littoral proprietor will not be disturbed by it, and in such a way that the public as the holder of the roadway will not become the possessor of the upland so as to be a littoral holder.

As applied to the facts in this case, however, a discussion of this subject becomes largely academic. Whatever may be the law with reference to millsites, it could hardly be contended that the appellee as the owner of the claims purchased from the two Indians did not become an upland owner. These claims, or the right of possession to the land embraced within these claims, date back to the 17th of May, 1884, and prior thereto, long before the enactment of the Act

of Congress containing the proviso under discussion. No one would contend that these claims did not extend down to the shore, for clearly Congress would not attempt to burden a title previously recognized by it with an easement such as a roadway without granting compensation or at least not without referring to it in express terms.

Furthermore, the Court found, and the uncontradicted testimony shows that the tide lands in front of those uplands, as well as the uplands themselves, were used and occupied by the Indians Bean and Johnson, and that the right of the Indians to these tide lands as well as to the uplands were conveyed to the appellee, thus bringing the case squarely within the facts in the cases of *Heckman v. Sutter*, and *McCloskey v. Pacific Coast Company*.

V.

Under the title of "The Street," counsel discusses various propositions with reference to the plank roadway built by the city in 1912.

Before taking up this discussion, counsel refers somewhat to the evidence in the case bearing upon this subject. Counsel says the first step in the building of this thoroughfare was taken in July, 1907, when the city passed an ordinance laying out the street and adopting the survey.

This statement of counsel is not entirely accurate. An attempt was made to prove that an ordinance was

passed on the date last mentioned with a view of laying out a street in the vicinity of where the street was since built.

Mr. Pettit, the City Clerk, was on the stand and testified that when he came into office as City Clerk certain ordinances were missing, among others, the ordinance numbered Ordinance 87. That he, however, found in the office of the Governor a newspaper in which this ordinance was purported to have been published, but that he himself did not know whether this was the ordinance or not, or whether it was a copy of the ordinance.

See evidence of Pettit, Rec., p. 181, *et seq.*

E. R. Jaeger testified that he was a member of the City Council in the year 1897, and that an ordinance numbered 87, something similar to the newspaper copy which purported to be a copy of ordinance 87, was passed, but that he did not know of his own knowledge that this was a copy of the ordinance as passed. On page 189, Mr. Jaeger testified in answer to a question as follows:

“Q. Mr. Jaeger, you don’t know whether the document offered in evidence is an exact copy of Ordinance No. 87 or not?

A. I don’t know anything about it; I never made a comparison and don’t know.”

In view of the fact that this was an equity case, the court admitted the newspaper copy of the purported ordinance No. 87 conditionally, saying that he

would further consider the matter, if it became necessary, in deciding the case.

Mr. J. W. Bell, a witness called by the defendant, the appellant here, testified that he was a member of the City Council in the year 1912. That when he came into office there was no ordinance No. 87 on file that he knew of. He understood that there had been such an ordinance but when they came to look it up his impression is that they could not find it. In answer to questions, he testified as follows:

“Q. In laying out the street, you didn’t follow any ordinance previously passed?

A. Not that I know of.

Q. And the work was done by you independently of any ordinance?

A. We made two surveys.

Q. Where were those surveys made?

A. They started where the gravel road ends at the present time.

Q. That is this side of the sawmill?

A. This side of the sawmill—this side of the Shattuck oil-house and back of the present street line.

Q. Up on the high land?

A. Up on the high land way above high tide, and the other one ran along the beach.

Q. And those two surveys were considered by the city council?

A. By the street committee—I think the city council accepted them on the report of the street committee.

Q. It was determined that the street along the beach would be the cheaper?

A. That was the idea.

Q. And that is the reason the street along the beach was built and not the street on the upland?

A. Yes.

Q. If the upland street had been the cheaper you would have built the street there and not put the street on the beach?

A. Yes.

Q. And all that surveying was done in the year of 1912 while you were on the council?

A. Yes sir.

Q. Without any reference to any previous ordinance or any previous survey?

A. Yes, sir; we hired a surveyor and had the survey made.

Q. Hired a surveyor, started on the work, laid out the street and built it?

A. Yes sir."

See evidence, Bell, Rec., pp. 191, 192.

A comparison of the two maps also to which counsel refers will show that while the purported street attempted to be surveyed in 1897, was in the neighborhood of the present street, it was not along the line of the present street, and as has already been shown by the testimony of Mr. Bell, which is not contradicted, that survey, if any had been made, had nothing to do with the construction and building of the street in 1912.

In the summer of 1912 the city counsel hired a surveyor, surveyed two different lines, adopted the cheaper one as the most feasible, and built the street, or roadway as it at present exists.

This was done without obtaining permission or consent from the appellee or any one else, and without

having any negotiations with any person whatsoever upon the subject. Upon this question, Mr. Bell testified as follows:

“Q. In building that street, Mr. Bell, from the sawmill to the end of the city limits, you had no negotiations with the Alaska Juneau Gold Mining Company whatsoever?

A. None whatever.

Q. Was any permission had from the Alaska Juneau Gold Mining Company to build the street?

A. Not to my recollection. *We had no agreement with any one.*

Q. Never spoke to the company or they never spoke to you about it?

A. No sir.

Q. The street was simply built without any talking about it at all?

A. Yes sir.”

See evidence Bell, Rec., p. 192 *et seq.*

These are the facts with reference to the construction of the street or roadway. It was built in the summer of 1912, and not only was no consent or permission obtained from the appellee, but no agreement was had with the Indian grantors of the appellee, for Mr. Bell testified as above quoted, “*We had no agreement with anyone.*”

Under Subdivision A, counsel then proceeds to argue that the highway can not be vacated on collateral attack.

In reply to counsel's argument in this regard, it is only necessary to say that this is a suit against the Worthen Lumber Company and not against the city,

and was not brought for the purpose of vacating the street. The court is not asked in this suit to vacate the street. Hence further discussion on this subject is not necessary.

Under Subdivision B, it is urged that the street was located prior to the millsite, and for that reason it was rightfully constructed because of the provisions of Section 2477, providing that the right of way for the construction of highways over public lands not reserved for public use is hereby granted.

In view of the fact that the plaintiff is now the owner of the tracts held by the two Indians, Bean and Johnson, ever since the year 1881, and that this street extends not only in front of the upland covered by these two tracts, but lies over the tide flats which were also claimed and occupied by the Indians, it becomes quite immaterial as to when the street was located with reference to the millsite. However, the statute authorizing the location of highways over the public lands did not authorize the location of highways over the tide flats which are held in trust by the general government for the use of the future state, any more than the mining law which authorizes the location of mining claims upon the public lands authorizes the location of mining claims on the tide flats.

In the case of *Lewis v. Johnson*, reported in 1st Alaska, 529, one of the parties had gone upon the tide flats while the land was still public land, and suit was

afterwards brought to enjoin this possession. The court held that he was a mere trespasser, and that when the plaintiff acquired his title he acquired the whole title together with the right of access to deep water and could eject the defendant notwithstanding his prior possession.

Should it be granted, therefore, that counsel's contention was correct, that the millsites did not become valid locations until after the construction of the street, the millsite claimant would acquire the whole right of possession, including the right of access whenever the right to the millsite attached. But the facts are, that the A Millsite was located in 1911, and this millsite, as a reference to the small plat which is made a part of the court's findings will show, covered all but a few feet of the upland above the tide land in dispute, and the U Millsite was located to cover this small fraction two years later. Also as has already been shown from the record, appellee commenced work looking towards the construction of its milling plant in the summer of 1911, one year before the street was built, and continued such construction work at all times since, so that when the street was constructed appellee had not only located the A Millsite, but was actively carrying on construction work upon it as well as the other millsites which form part of the group. The contention of counsel that these millsites were not actually occupied and used ever since 1911, is not borne out by the record. The wit-

ness Lindsay testified (page 174 of the record) that in the summer of 1911 there was work done on some of the millsites.

The witness Wayland testified (at page 177 of the record) that the Alaska Juneau Company commenced work on the group of millsites looking towards the construction of the milling plant on it, in the summer of 1911, and that that work then commenced had been carried on continuously ever since during the working season. That men had been at work there at all times from 1911 up to the present time, excepting in the winter time, when work could not be carried on.

The testimony of other witnesses shows that a sum in excess of a million dollars has already been spent in that behalf. The map in evidence shows structures of some kind or description placed on all the various millsites; also the structures that will be there when the milling plant has been completed.

It is idle, therefore, to contend that all that could be done looking toward the construction of a milling plant on the millsite under discussion was not done. A milling plant of that size and character can not be constructed in a day, nor does the law require anything of that character. Moreover, as has already been stated, the question of the validity or invalidity of the millsites, or when they were located, is a matter that does not affect the issues in this case, since the ground here in dispute, both the upland and the

tide land, was occupied by the Indian grantors of the appellee since 1881, and no patent having been obtained to the millsites these Indian titles are still subsisting titles held by the appellee.

Under Subdivision C counsel attempts to show that when the Indian titles were purchased, they were burdened with the easement of the street, and that the appellee took subject to this easement.

The evidence of Mr. Bell, as we have already shown, shows that the city did not make any agreements with any one: that the city went there not only in disregard of the rights of the appellee, but in disregard of the rights of the Indians as well, and constructed the street.

Now it is difficult to see in any case how the city could, by trespassing upon the lands of another, whether it be the appellee or the Indians, not only acquire a valid right to the ground trespassed upon, but acquire a right so sweeping as not only to deprive the appellee or the Indians of the land actually taken, but also of the most valuable right that attaches to the lands that were left; that is to say, the right of access to deep water from those lands.

It is clear from a consideration of the case of *McClosky v. Pacific Coast Company*, that this court did not take that view of the situation. In that case this court discussed with great care and particularly the rights of the public in maintaining the street and the evidence bearing upon that subject, indicating that the

court deemed it of the highest importance to inquire first of all whether the street was there rightfully.

But there are special circumstances which enter into this case. The court found, and, as we have already demonstrated, this finding was supported by the uncontradicted testimony upon the subject, that the street was not only built upon the tide flats below the line of ordinary high tide, but was so built that it did not cut off the access of the upland owner.

Now under the authority of *Decker v. Pacific Coast Company* and *Columbia Canning Co. v. Hampton*, as well as the more recent case of *Barron v. Alexander*, the upland owner, whether the upland belonged to the Indians or to the appellee, could not stop or prevent the construction of the street for the reason that it did not interfere with the access to deep water. If a suit had been brought to prevent this work of construction, it would have been at once dismissed by the court on that ground. So long as the city did not cut off this access, it had a perfect right to construct the street. The appellee, as well as the Indians, were helpless to prevent its construction, for the simple reason that they were not injured thereby. Their rights were not invaded. Their access to deep water was as unobstructed after the street was constructed as before; yet it is argued that because of the construction of the street under those circumstances their right of access, the most valuable right attaching to their upland, was lost. Clearly this would be taking property not only

without compensation, but without very much ceremony, and would hardly be sanctioned under the authority of *Yates v. Milwaukee*, 10 Wallace, 504, previously discussed.

The foregoing, we think, sufficiently answers the various propositions of laches, estoppel, and other like matters urged by counsel in subdivisions D and E. Clearly one cannot be guilty of laches and cannot be estopped because he permits anything to be done the doing of which he is powerless under the law to prevent.

VI.

Under Subdivision VI, counsel enters into a discussion relating to appellee's right to wharf out over the shoal waters lying between its upland and the deep waters of Gastineau Channel.

At the outset, it must be stated that appellee intends merely to build a wharf in order to facilitate its access to deep water, and that the wharf is only to be used in connection with the exercise of this right of access. This is clearly shown by the uncontradicted testimony and the findings of the court. It therefore becomes unnecessary to discuss the upland owner's right to build a wharf for other purposes and other uses. In the case of *McCloskey v. Pacific Coast Company*, this court said that the upland owner, while he had no right to build the wharf because of his upland ownership, had the right of access. It was not neces-

sary for this court in that case to explain this matter any further, but in the case of *Hazelet v. Dalton* the court held that the upland owner had a right in order to reach deep water from his upland, that is to say in order to exercise his right of access, to build and use a wharf for that purpose. These two decisions by this court are therefore in perfect harmony. The upland owner, as is held in the former case, has no right because of his upland ownership to build a wharf, but he has a right of access because of his upland ownership, and if, in connection with the exercise of that right it is necessary to use a wharf he has a right to use and maintain it, for, as was said by this court in the latter case, this right of access would be useless unless in its exercise the upland owner had a right to build a structure over the shoal waters which would enable him to reach deep water from his upland. This whole matter was gone over and decided by this court in the case of *Dalton v. Hazelet*. In that case the appellee owned a tract of land bordering on Orca Inlet, patented under the homestead laws. The defendant had driven piles in front of a portion of the tract owned by the plaintiff, and had capped and covered these piles. Suit was brought to enjoin the maintenance of this structure. The defense was that the defendant had gone upon the unoccupied tide lands, driven the piles and constructed the structure complained of for use as a wharf,—that the Copper River Railroad had condemned a strip

of land along the shore for railroad purposes, and that because of this the plaintiff's riparian rights, whatever they were, had been lost; and further, that no such riparian rights existed by reason of the reservation for a roadway provided for in the Act extending the homestead laws to Alaska.

The lower court granted the injunction; on appeal it was held by this court that the findings of the lower court was such as to leave the inference that the right of way for the Copper River Railway extended along the shore in such a manner as to leave the plaintiff some land between it and the waters of the Inlet. It was held, however, that independent of this fact, the existence of the railroad's right of way would not cut off the riparian or littoral rights of the upland owner. The court then proceeded to hold that the sixty rod roadway was not reserved across the tract patented under the homestead laws, but that this reserve for a roadway applied only to the lands reserved from entry under the provisions of the Act.

The court then held that the upland owner had a right of free access to the deep waters lying in front of his upland and had a right to wharf out across the shoal waters of the shore in order to reach deep water. Upon this point the court say:

"We think that under the facts stated, the plaintiff is entitled to have relief against this obstruction. That while in a territory a grant of land

bordering on or bounded by navigable waters conveys to the grantee no right or title to the shore or soil below high water mark, nevertheless, such a grantee has the right to a free and unobstructed access to such waters. But how shall the littoral owner have access to navigable waters when shoal water intervenes? The Supreme Court has answered this question in *Dutton v. Strong*, where the Court say:

“Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea: and where that necessity exists it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability where the necessity for such erections ordinarily ceases.’”

In view of this decision by this court, it would seem useless to further discuss this point.

The contention of counsel that the case of *Yates v. Milwaukee*, and *Dutton v. Strong* were subsequently overruled by the Supreme Court in the case of *Scranton v. Wheeler* is without foundation. The opinion in the case of *Scranton v. Wheeler* admits of no such construction.

The same contention was made in a recent case before the Supreme Court of California, and that court, after carefully reviewing the matter, took the view taken by this court in the case of *Dalton v. Hazelet*, and held that the case of *Scranton v. Wheeler* in no wise changed the law as laid down in *Yates v. Milwaukee* and *Dutton v. Strong*.

Touching this matter, the Supreme Court of California say:

“That case involved the right of the sovereign to use and improve its navigable waters, and in the opinion it was said:

“ ‘The decision of *Yates v. Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case’ instead of being overruled the case of *Yates v. Milwaukee* was not even criticized. It has been usually followed in the several states and by the Federal courts.”

Then follows a long list of citations from both State and Federal courts.

San Francisco Savings Union v. G. R. Petroleum Mining Company, 144 Cal., 134.

No further discussion of the case of *Scranton v. Wheeler* is deemed necessary, as the opinion in that case clearly speaks for itself.

The next point sought to be made in this connection is that because it was not shown in evidence that the appellee had applied for and received a permit from the Secretary of War to construct a wharf, this action can not be maintained.

Whether such permit was obtained, however, at the time of the trial is wholly immaterial. The right of access to deep water and the incidental right to construct a wharf in connection with the exercise of that right of access, is not derived from any permit issued by the Secretary of War, but is a right that the upland

owner has by reason of the ownership of the upland, and of this right the owner of the upland can not be deprived without due process of law and without the payment of compensation.

Yates v. Milwaukee, 10 Wallace, 504.

The Act of Congress referred to by counsel did not grant the owner of upland the right of access. He had this right before the passage of the Act, nor can the Act be so construed as to deprive him of this right without compensation under the authority of *Yates v. Milwaukee*. The Act referred to can be upheld only as a measure intended to regulate the construction and maintenance of wharves and other like structures, passed by Congress under the police power, and since the appellee was not at the time of the trial either constructing or maintaining a wharf, the Act in no wise affects the issues in the case. The appellee's right of access belongs to it as the owner of the upland, and this right having been obstructed by the appellant, it had a right to relief. When the appellee actually commences the construction of a wharf, or maintains a wharf on the premises in question, the question of whether or not it has obtained the necessary permits can, of course, arise as between it and the government, but no such question could arise at the time of the trial, there having been no construction or maintenance of any wharf in violation of the Act, unless the attempted construction of a platform by the ap-

pellant for the purpose of storing its lumber be such a violation. In any event the appellee had not violated the Act in any regard.

The effect of the Act of Congress under consideration was discussed by the Supreme Court of California in the case of *San Francisco Savings Union v. G. R. Petroleum Mining Company*, 144 Cal., 134, where the court say:

“The Secretary of War cannot grant rights to lands owned by the state, nor can he deprive plaintiff of his property and rights by authorizing a stranger to take them.”

VII.

Counsel here contends that because of prior possession, appellant is entitled to protection.

The evidence clearly shows, as has already been pointed out, and this much is conceded by counsel in his brief, at page 72, that the sawmill was originally built on the thousand-foot Jorgenson reservation and that the log boom did not extend out to the south of this reservation until the summer of 1912, when five dolphins were driven to the south of the southernmost line of the reservation. That is to say, ten piles were driven in pairs so as to make five dolphins placed fifty feet apart, and something like 17 piles were also driven at the same time approximately along the line now occupied by the street. This is the first and only evidence of possession of any tide lands to the south

of the Jorgenson reservation on the part of the appellant that is contained in the record, and when these piles were driven appellee had purchased the General Grant Mining Claim from Mr. Shattuck, the President of the Alaska Supply Company, by which the piles were driven, and had located its millsites, and the Indians, who the following year conveyed their title to appellee, were in possession not only of the upland, but of the tide land as well.

The prior possession that is protected by the courts is the possession and occupation of public lands by the first-comer, who applies the same to some useful purpose. It is not the possession and occupation of a mere trespasser, who goes upon the lands already possessed by another, or, what amounts to the same thing, goes on the tide flats in front of the lands of such other, with the view to cutting off such other's access to deep water. The driving of the piles by appellant in 1912 was an invasion of the rights of the upland owner if the maintenance of such piles interfered with his right of access, and was a naked trespass as against the Indian occupants of the tide lands, who had the right of possession and occupancy of such tide lands under the Act of May 17, 1884.

In this connection, also, it may be added that the driving of these piles did not constitute the taking of possession of the tide land in question.

The statement by counsel that the construction of a wharf over the tide land in dispute will seriously

inconvenience appellant is without foundation, and is not borne out by the testimony. That the Jorgenson reservation furnishes appellant all of the room necessary in the conduct of its business is evident from the following facts: J. P. Jorgenson, the builder of the mill, originally limited himself to the use of this thousand feet, conveying his interest to the balance of the area covered by the Abe Lincoln and General Grant to appellee's grantors, evidently believing that the thousand-foot strip was sufficient for his purposes. From the year 1902 until the year 1912, a period of ten years, the sawmill was actually operated continuously without extending the log boom beyond the thousand-foot reservation, and in the year 1911, while Mr. Henry Shattuck was President of the Alaska Supply Company, the concern by which the mill was being operated, he, instead of reserving for the use of his company an area in addition to the thousand-foot strip, conveyed the General Grant claim to appellee. Clearly, if the water front lying in front of this claim was at all necessary in connection with the operation of the sawmill, Mr. Shattuck would, instead of conveying the General Grant claim to appellee, have reserved it for his own use.

Appellant's contention that the construction of a wharf over the shoal water lying between the upland and deep water would be an obstruction to navigation finds no support in the authorities. The upland owner in connection with the exercise of his right

of access has a right to construct a wharf from his upland to deep water which is regarded as the point of navigability; beyond this he has no right to go, but he has the unquestioned right of building a wharf over the shoal waters until the point of navigability, a point where the water is deep enough to admit of the passage of ships, is reached. Upon this point all the authorities are a unit.

- Dalton v. Hazelet*, 182 Fed., 561;
Dutton v. Strong, 1 Black, 339;
Yates v. Milwaukee, 10 Wallace, 504;
Ill. Cent. R. R. Co. v. Illinois, 146 U. S., 387;
Lewis v. Johnson, 76 Fed., 477;
Reeves v. Backus-Brooks Co., 86 N. W., 337;
Gray v. Bartlett, 32 Am. Dec., 208.
Hallock v. Suitor, 60 Pac., 384;
Thayer v. New Bedford R. R. Co., 125 Mass.,
 253;
Burrows v. Gallup, 87 Am. Dec., 187;
Powell v. Springston Lumber Co., 88 Pac., 97.

VIII.

STATEMENT OF APPELLEE'S POSITION.

In replying to the various contentions of counsel for appellant, we have in a large measure, although it was done in a disconnected manner, stated our own position.

The purchase of the Abe Lincoln and General

Grant Lode claims by appellee from the grantee of the J. P. Jorgenson Company, Mr. Henry Shattuck, who was at the time of the grant himself acting as President of the Alaska Supply Co., the name by which the J. P. Jorgenson Company was then known, notwithstanding the fact that the claims had just previously been declared to be non-mineral in character, not only shows that the appellee dealt with the highest degree of fairness in obtaining title to the ground in question, but places the appellant in the unenviable position of now seeking to claim rights because of the driving of some piles by Mr. Shattuck on the beach in front of ground the title to which Shattuck, the grantee of the Jorgenson Co., and also that company's president, had transferred to appellee.

The location of the millsites to cover the same area was, of course, made necessary by the decision of Department and in view of the fact that the premises were to be used as a site for a milling plant, this was clearly the appropriate manner in which to acquire the title. The purchase of the Indian claims for a fair and adequate consideration again gives evidence of appellee's disposition to deal fairly with all those having legitimate claims to the area required by it as a site for a milling plant. Surely the appellee did all that could be done to acquire the rights which the necessities of the case, as disclosed by the evidence, now compel it to insist upon, and the appellant, be-

cause of the matters referred to, should be the first to concede those rights.

Appellee's rights to the upland can not be, and are not, questioned. That appellee has a right, as an upland owner, to access from its upland to the deep waters of the Channel lying in front of it, and that it has the right to wharf out in the exercise of that right can not be seriously disputed as a legal proposition. The contention that the upland owner's right of access is cut off and lost because a municipality, without a grant from the upland owner and without his consent, constructs a roadway over the tide flats in such a manner as not to cut off the upland owner's access, thereby rendering him powerless to enjoin or interfere with the construction of the roadway, asserts a proposition that refutes itself.

But aside from these considerations, a further reason exists why the decree of the lower court is correct and should be affirmed.

The complaint alleges and the court finds not only that the Indian grantors of the appellee occupied and possessed the two tracts of upland which embrace all the upland lying above the tide land in dispute, but also that those Indian grantors occupied and used the tide land; that is to say, the land lying between ordinary high water and low water, on and prior to the passage of the Act of May 17, 1884.

The finding of the court upon this subject is as follows (Finding No. 4) :

“That on and prior to May 17, 1884, and from that date continuously, the upland immediately abutting upon the tide-land in dispute herein was also claimed and occupied by Indians, who claimed, occupied and used the same, together with the tide-land in front thereof, as a place of residence and as a place for landing and hauling up of canoes and for other purposes; and that at the time of the doing of the things complained of in this suit plaintiff had acquired by purchase all of the said right, title, interest and claim of the said Indians in and to said upland and said tide-land, and is now the owner of said rights.”

Appellant's brief, at page 10, contains the following language:

“Appellant most earnestly contends that there is no evidence in the records sufficient to support the Court's findings that the Indians had a good title to the premises in question, nevertheless, inasmuch as appellee alleged and the learned court below found as a fact that the upland was occupied and owned by certain Indians under the law of 1884 until they sold to appellee in 1913, after Franklin Street was constructed, appellant is disposed to accept the consequences of that finding and to treat it as binding on this appeal. Appellee, having led the Court to make this finding, is estopped from attacking it.”

Four witnesses testified to the effect that each of appellee's Indian grantors settled on the tract claimed by him “one year after the camp was struck,” that is

to say, the year 1881, and claimed and occupied the same until he conveyed to the appellee. These witnesses agree that these Indians not only during that time occupied the upland, but occupied and used the tide land as well. That in both cases the rocks and debris had been cleared off from the tide land and the same used and occupied in connection with the hauling in and landing of canoes, and that in the case of Johnson, a canoe shed also had been built on the tide flat for use in this connection. (See evidence Fannie Johnson, Rec., pp. 134, 135; evidence Jimmie Johnson, Rec., pp. 130, 131, 132; evidence St. Clair Johnson, Rec., pp. 112, *et seq.*; evidence Tom Johnson, Rec., pp. 124, *et seq.*)

No evidence whatsoever was offered by the appellant to contradict or deny the testimony of any of these witnesses, so that the finding of the court in regard to this matter is based upon the undisputed evidence.

Such being the case the appellee has, under the authority of this court, in the cases of *Heckman v. Sutter*, *McCloskey v. Pacific Coast Company*, and *Hampton v. Columbia Canning Co.*, the right not only to wharf out over its tide flats, but the right to the possession and occupancy of the tide lands themselves. And regardless of the manner in which the roadway or street was constructed, and regardless of the question of what the effect of the construction and maintenance of a roadway or street in other cases would be upon the rights of the upland owner, ap-

pellee in this case would have the right to the occupancy and use of the tide flats in dispute, and upon which appellant was at the time of the commencement of this suit attempting to construct a platform.

This precise question was passed upon by this court in the case of *Heckman v. Sutter* and *McCloskey v. Pacific Coast Company*. In the case of *Heckman v. Sutter*, an Indian had occupied and used a piece of upland in connection with the construction and maintenance of a house, and had used the tide flats in front of the land so occupied at certain seasons of the year for the purpose of drawing his nets over these tide flats in carrying on his fishing operations. This court held that this was sufficient under the Act of 1884 to entitle the grantee of this Indian to the occupancy and use of these tide lands. In passing upon the effect of the Act of 1884, this court say:

“The prohibition contained in the Act of 1884 against the disturbance of the use or possession by any Indian or other persons of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high water mark.”

Again, in the same opinion, the Court say:

“Congress saw proper to protect by its Act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the com-

plainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants."

Heckman v. Sutter, 119 Fed., 88-89.

In the case of *McCloskey v. Pacific Coast Company*, one Murray had laid claim to a tract of upland together with the tide land lying in front thereof by making a location thereon prior to the Act of 1884. A street had been built in such a manner that it was partly upon the upland and so as to separate the upland from the tide land and make the public as the holder of the street the littoral occupant and holder. The court held that under those circumstances, it having first decided that the street had been properly dedicated and subsequently by solemn conveyance conveyed to the city, the street cut off the littoral rights of the Pacific Coast Company, it having been found that the company ceased because of the existence of the street to be a littoral proprietor, but that notwithstanding this the Pacific Coast Company as the grantee of Murray who had located and claimed the tide flats prior to the passage of the Act of 1884, was entitled to the possession of the tide lands and could maintain a suit to enjoin the interference with its possession. In passing upon this matter, the court say:

"We find such ground in the fact which is shown by the bill and in the proofs that the appellee's grantors at the date when the Act of Congress of May 17, 1884, was enacted, claimed the possession

and the right of possession to all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk. That Act of Congress provided a civil government for Alaska, and, among other things, enacted 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress.' There has been no subsequent legislation affecting the right of possession thus recognized, and the protection thus afforded by the statute has not as yet been withdrawn. The appellee having this right of possession of the tide land between the roadway and the line of low tide could protect such possession by any appropriate suit or action."

McCloskey v. Pacific Coast Co., 160 Fed., 801.

The doctrine laid down in these cases was reaffirmed by this Court in the more recent case of *Columbia Canning Company v. Hampton*, 161 Fed., 60.

Under the facts and findings of the court and the authority of the cases just referred to, appellee's right to the relief demanded is clearly established, and the decree of the lower court should accordingly be affirmed.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee.

CURTIS H. LINDLEY,
Of Counsel.

No. 2640

Filed

FEB 29 1916

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F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

WORTHERN LUMBER MILLS,

Appellant

vs

ALASKA JUNEAU GOLD MINING COMPANY,

Appellee

Appellee's Petition for Re-Hearing

Comes now appellant above named and respectfully petitions this honorable court that a re-hearing be ordered in the above entitled cause upon the grounds and for the reasons below set out and to which the court's attention is most earnestly invited:

The one cardinal question submitted to the court in this case was whether or not appellee had an *ex-*

clusive right to access from the street to the adjoining navigable waters, or whether appellee shared that right with the public. If appellee shared the right of access with the public it concededly had no standing in court in this proceeding.

This court decided this question against appellant's contention under what appears to be a radical misapprehension of our position, and holds, not in express language, but by necessary inference, that appellee has the exclusive right of access to navigable water from the street and that the public have no such right of access.

Our cardinal contention is that the public have a right of access to navigable water wherever such access can be gained without trespass on private property, and that therefore the public have a right of access from Franklin Street to the adjoining waters. Obstruction to such access being a public and not a private wrong, it can be enjoined only at the instance of the public.

This court, in conformity with the holdings of the lower court, finds that Franklin Street is one of the principal streets of Juneau. We shall construe this, for the time being, to mean that this court finds Franklin Street to be a public thoroughfare, with the right in the public to use it as such. The court does not deny that the public waters adjoining the street are also a public thoroughfare. Nevertheless, this court holds that though the public have a lawful right to be both on the street and on the navigable

highway adjoining the street, they have no right to pass from one to the other, and that this right of ingress and egress from the public street to the public highway alongside of the street belongs *exclusively* to the Alaska Juneau Gold Mining Company.

The leading error of the court, as we see it, is found in the following statement in the opinion: "Franklin Street interposes, in fact, no obstacle to the appellee's access to the waters of Gastineau channel, and we hold that it interposes no obstacle in law." Appellant has never contended that Franklin Street interposed a practical obstacle to appellee's access to Gastineau Channel. It may be admitted that it facilitates such access. Nor has appellant ever contended that the street interposed an obstacle in law to appellee's access to Gastineau Channel. On this point the court has absolutely misunderstood our position. What appellant contended and contends is that the appellee has no *exclusive* right to such access from the street, but shares such right with the public, and that without such exclusive right of access, it cannot maintain this action unless this court means to depart from the old and well established landmarks of jurisprudence.

29 *Cyc.* 1208;

29 *Cyc.* 324;

Gould on Waters, Par 122.

Our position is that where a private party owns or has a right of exclusive possession of upland adjoining a highway,—whether this be a navigable

highway or not,—such party has an exclusive right to go from that highway to his private premises adjoining it. Anybody else attempting to do so would be a trespasser. Any obstruction of that right of access to the public highway from those private premises would therefore be an obstruction of a private right, and as such would be actionable at the instance of the private injured party. But where the public have a right to be on the premises adjoining the highway,—whether it be a navigable highway or not,—they have a right to pass to such premises from such highway as long as there is no intervening zone of private property rights upon which trespass will thereby be committed.

Where thus the right of access to and from a public thoroughfare is a public right, any obstruction of it is a public and not a private wrong, and can be redressed only at the instance of the public acting through the proper officials.

See authorities above cited.

It is admitted that where the upland is owned by a private individual and a highway be established over the upland adjoining the water, the upland owner has still an exclusive right of access from his land to the highway, *but from this highway to the adjoining water he must share this right with the public.* This is what the courts mean when they say that a public highway adjoining navigable water cuts off the littoral right,—for littoral right is private right as distinguished from right shared with the public.

Counsel for appellee recognized this position as incontrovertible and sought to evade it by claiming that there was some mystic, sacred right attached to the line of mean high tide which gave whomsoever had possession of this line the exclusive right to cross any property below that line. But in the reply brief this contention was shown to have for support neither reason nor authority and this court has not dignified the alleged doctrine by even a reference to it.

It was contended in appellant's brief that navigable waters were a public highway clear up to line of mean high tide. This has not been controverted by appellee, nor is there anything in the court's opinion which indicates a disapproval of this doctrine. It is not necessary to look beyond the authorities cited on page 64 of appellant's brief for support of this contention, and we shall therefore not burden the court with any further discussion of that subject, but we shall assume that the court assents to the proposition. This assent is an affirmation of the proposition that the public have a right to be on and make use of all the navigable waters below line of mean high tide, but this again involves the assent to the proposition that *the public have a right of access to the navigable waters, whenever such access can be had without trespassing on private premises.*

Can, under the facts of this case, the public have access to the waters of Gastineau Channel from

Franklin Street without trespassing upon any private property?

Gastineau Channel adjoins Franklin Street. There is no space between the two. One merges into the other. The public may therefore pass from the street to the navigable highway, and from the latter to the public street, without touching or in any way interfering with private property.

There are, however, certain remarks made by the court which indicate that the latter is of the opinion that though this street be a public thoroughfare, yet it is possessed of certain properties different from those which pertain to the ordinary street open to public travel. The court says:

“The facts go no farther than to show that a municipal corporation has laid out the street on tide lands in front of the upland and has used it for two or three years without having secured from the upland proprietor any right so to do, or obtained that right by condemnation proceedings.”

If the street be a public highway, as the court seems to affirm at another place in the opinion and nowhere denies, surely the right of the appellee's access from the street to the adjoining navigable highway has merged in the public right of such access, for the Alaska Juneau has no greater right on either highway, wet or dry, than have the public.

If, on the other hand, the court wishes to be understood as holding that Franklin Street is not a

public thoroughfare and that the public have no right to travel it, then we implore of the court to read the argument on this subject contained in chapter V, (page 40) of our original brief. That argument was left untouched by counsel. In fact, counsel admitted that the street was a public thoroughfare, and sought to evade the effect of this forced admission by contending that by virtue of its possession of the line of mean high tide appellee had the exclusive right of access from the street to the adjoining highway on water.

It must be assumed from the above language by this court that the court intends to hold that if Franklin Street had been dedicated to public use by the owner of the premises over or in front of which it runs, or had been condemned for public use by the city, or had been used for a long period of time as a street, the appellee would have no exclusive right of access from the street to the water, and that this would be so whether the street is constructed over tide-land or over high-land, so long as it adjoins navigable water on at least one side.

It now becomes pertinent to inquire how long must the street be used as such before appellee's *exclusive* right of access to it from the adjoining waters ceases and it be forced to share the right of access with the public? Will it be in five years or in ten years?

If we correctly surmise the court's meaning, the answer must be: "Whenever by user the street has

become so well established that the appellee cannot question the right of the public to use it." But the law is settled beyond controversy that appellee is not now in position to question the legality of this street. This was, at least by implication and tacitly, admitted by counsel in their brief and by their failure to answer any part of the argument submitted in chapter V of our original brief.

Inasmuch as this court has ignored the authorities there cited and quoted from, though these authorities meet the issues squarely, we again earnestly beg of the court to consider them. Two of the points discussed in that chapter we beg to especially emphasize here:

This court has held that at the time the street was built the upland was owned and in the possession of the Indians. The largest Indian tract, lot "B," known as the Jimmie Bean tract (page 148), was owned by and in the possession of this Indian even at the time this action was instituted and for at least twenty days thereafter. The complaint was served August 5, 1913. The deed to the Jimmie Bean tract was not executed till August 22, 1913, and was not acknowledged till three days later (page 231). The other Indian deed was also executed after the street was built, but before this action was commenced, to-wit, May 1, 1913 (page 237). When the Alaska Juneau purchased these premises from the Indians, it took the lands subject to the burdens *rightfully* or *wrongfully* imposed upon them during the

ownership of the grantor. On this subject the Supreme Court says:

“It is well settled that where a railroad company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner of such lands*, a subsequent vendee of the latter takes the land subject to the burdens of the railroad.”

Roberts vs. N. P. Ry., 158 U. S. 1.

This language has been repeated verbatim and applied in the following cases:

Maffet vs. Quine, 93 Fed., 347 (349)

Northern Pac. Ry. vs. Murray, 87, Fed., 648 (651);

King, et al, vs. Southern Railway Co., 119 Fed., 1017;

Kakeldy vs Railway, 80 Pac., 205.

The doctrine is universal and applies to all corporations having the right of eminent domain.

Judge Bellinger, paraphrasing the language of the Supreme Court, announced the doctrine in its universal application through the following language:

“It is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner of such land*, a subsequent ven-

dee of the latter takes the land subject to the burden thus placed upon it.”

This court does not deny that such is the law. Nor does the court say that this law does not apply. Why then should appellant be denied the benefit of this law?

Not only is the appellant entitled to know, but the entire bar and the public are entitled to know why these litigants should not be governed by this universal principle which has stood the test of ages and received the confirmation of the highest judicial authority in the country.

But even if the appellee had been the owner of the premises at the time the street was built, it is not now in position to dispute the right of the public to use the street.

As a corollary to the doctrine above discussed, there is another and equally conclusive doctrine applicable to this point of the case. It is this: Where a street has been established *with or without the permission of the land owner*, it is to all intents and purposes a public thoroughfare; and if the land owner has a complaint, his remedy is an action for damages,—he cannot dis-establish the street or interfere with the public traffic. This doctrine is put in the following language by the Circuit Court of Appeals for the Seventh Circuit, in the recent cases of *Kamper vs. Chicago*, 215 Fed., 706:

“When a public or quasi public corporation,

having the delegated power of eminent domain, without condemnation proceedings, enters upon land (which the owner would be powerless to hold against appropriation for public use) and thereupon completes a public work and is using it in public service, the land owner will not be permitted, by ejectment or mandatory injunction, to retake possession and thus break in two a railroad or a water tunnel or other work which is being used as an entirety for the public good. This is so, not because equity refuses to frown upon unlawful seizure, but because equity will not tolerate a possessory demand being turned into a means of oppression and extortion, and because a consideration of the rights and convenience of the public outweighs the qualified possessory right of the owner,—a right he could not have absolutely maintained even initially as against the public use. And equity sufficiently indicates its disapproval of the wrongful taking by pointing the owner to the law courts, where his right to compensation can be determined.”

The authorities supporting this doctrine are discussed in section E (page 57) of the original brief. We have found no conflict in the authorities on the subject, nor have counsel denied either the correctness or the applicability of the doctrine as above announced, nor has this court denied either the correctness or the applicability of our contention on this sub-

ject. Why then is appellant deprived of the benefit of this law?

When Mr. Worthen, as appears by the records, came to Juneau in the early part of 1913 and found the street fully established and used as a public highway, he had a right to rely upon this incontrovertible legal doctrine to protect his investments in the mill property against all but his government. His counsel had a right to advise him that under these universal decisions of the highest tribunals, the street was to all intents and purposes a public highway and would protect his lumber-yard and booming-grounds against any private aggression, and Mr. Worthen had a right to invest his money in reliance on such advice.

If it is the intention of the court to overrule the authorities on this point, it should be done so clearly and explicitly that the bar may not be in doubt as to what is meant.

Surely, in face of all these authorities, the street here in question, even were it in the first place illegally established, even over the protests of the land owner,—which is not the case,—it would be in every respect, as far as the public is concerned, a public thoroughfare possessed of all the legal characteristics of a public highway. Public traffic thereon cannot be interfered with by private individuals. The street cannot be closed by the courts. And the public have just as much right of access from it to the waters of Gastineau Channel as has appellee.

The decision of the court in this case, if allowed to stand, will unsettle a vast amount of property rights in Southeastern Alaska. The country is so rugged that in most settlements the principal streets are constructed over tide waters. At many places the larger part of both the business and residence district is erected on piles. Ketchikan has approximately two miles of tide-land street thus constructed. Juneau has over one mile of street built below tide line. Business houses and residences are erected on both sides of these highways. Such streets are built sometimes by private individuals impatient at the delay of public authorities, and sometimes built by the municipalites. Not infrequently do the towns spring into existence on piles over tide lands, whence they grow up the mountain side as the line of least resistance.

These tide land streets are indispensable to the public and are courted by the settlers along the beach. Only once in the history of Southeastern Alaska has condemnation proceeding been resorted to for the purpose of making room for a street on tide flats, and that was where the tract needed was actually occupied by two-story business blocks. In the absence of protests, the municipal authorities take it for granted that the construction of the street is welcome by all who live along the line of it.

The right to occupy the tide lands, except as against the government, has come to be looked upon and treated as a property right on the coast of Alaska

where streets intervene between the upland and deep water. The authorities cited above and relied upon by appellant have become a rule of property and millions of dollars are invested on the strength of them.

If the decision of the court in the case at bar be allowed to remain unchanged, it will tend to unsettle property rights to an astonishing degree and involve waterfront occupants in interminable litigation. Anyone who has a piece of upland will be obsessed with a craving for free access across the street to the ocean, and those in front of him will be at his mercy.

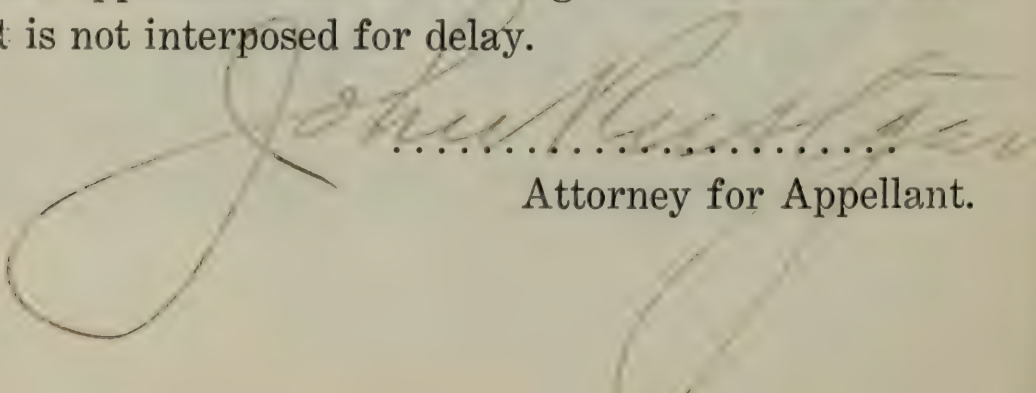
There is probably not one street of this character in Southeastern Alaska where the actual consent of the upland owner can at this time be proven, or where the proceedings of establishing the street by municipal authorities have been "regular" in the technical sense.

Respectfully submitted,

JOHN RUSTGARD,

Attorney for Appellant.

THIS IS TO CERTIFY that in my judgment this application for re-hearing is well-founded and it is not interposed for delay.



 Attorney for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WORTHEN LUMBER MILLS,
Appellant,
vs.
ALASKA JUNEAU GOLD MINING
COMPANY,
Appellee.

No. 2640.

**Supplemental Petition for Rehearing on
Behalf of Appellant.**

METSON, DREW &
MACKENZIE, and
HORATIO ALLING,
Of Counsel for Appellant.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co.,
San Francisco

Filed

Mar 16 1916
F. D. Monckton

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WORTHEN LUMBER MILLS,	} No. 2640.
<i>Appellant,</i>	
vs.	
ALASKA JUNEAU GOLD MINING	} No. 2640.
COMPANY,	
<i>Appellee.</i>	

SUPPLEMENTAL PETITION FOR REHEARING ON
BEHALF OF APPELLANT.

Having been retained in this matter subsequent to the decision herein of February 7, 1916, the undersigned beg leave to present this Supplemental Petition for Rehearing on behalf of appellant.

There will be no attempt herein to reopen the general discussion of the points raised on brief and considered and passed upon by the Court. There are two propositions, however, of such seeming weight and consequence as to be entitled to the most serious consideration by the Court before the judgment below shall be finally affirmed. They are

First. The right to wharf out over tide lands to deep water does not inhere in the littoral right of

access, but *must rest in grant* from the tide land owner, and no such grant was shown.

Second. The right of access shown was *to a public use* and any obstruction of such *use* may be redressed only at public suit.

If these two propositions are sustained by the facts and warranted by the law, it must follow that no private right of appellee's was shown to have been either violated or threatened, and the judgment of the lower court awarding an injunction should be reversed.

I.

The right to wharf out over tide lands to deep water does not inhere in the littoral right of access, but must rest in grant from the tide land owner, and no such grant was shown.

The title to the tide lands below mean high-water, in front of the premises in question, is in the Government. The right to wharf out over these tide lands to deep water would constitute a servitude in favor of the upland owner. The point made is that that servitude right does not inhere in the upland ownership, but, where it exists must rest in grant from the Government.

This was expressly held in *Shively v. Bowlby*, 152 U. S., 1, 38 L. ed., 331, and in *Scranton v. Wheeler*, 179 U. S., 141, 45 L. ed., 126. In the first case the

question was most elaborately and exhaustively discussed, the earlier Federal cases reviewed and distinguished and the holdings of the various State courts examined and considered. Beyond question it must be said to be the leading case upon this subject.

In that case (*Shively v. Bowlby*), the Supreme Court of Oregon decided first, that a grantee of the United States of lands bounded by tidal navigable waters obtained by virtue of such grant no exclusive access to deep water, *and no wharfage rights* below ordinary high tide in front of said high land; second, that the State of Oregon was the absolute owner of all rights in front of the high land granted by the United States to said grantee below the meander line to deep water, to the exclusion of any and all rights of said grantee under his grant from the Government; and third, that the State of Oregon had the absolute power to dispose of said tide lands and all wharfage rights in front of the high land. This judgment by the Supreme Court of Oregon was affirmed by the Supreme Court of the United States in the case cited. After a most thorough and extended discussion of the subject and the authorities, Mr. Justice Gray says:

“The conclusions from the considerations and authorities above stated may be summed up as follows:

“Lands under tide water are incapable of cultivation and improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by indi-

viduals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people. . . .

"Upon the acquisition of a territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory. . . .

"The United States while they hold the country as a territory, having all the powers both of national and municipal government, *may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters.* . . .

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, *no title or right below high water mark*, and do not impair the title and dominion of the future State when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States."

It is then held that the upland grant by the United States included no title or right in the land below high water mark. The right to wharf out to deep water was in issue and had been denied by the judgment of the Oregon court and that judgment was affirmed.

The holding in *Shively v. Bowlby* was followed by this Court in *Columbia Canning Co. v. Hampton*,

161 Fed., 61, and attention called to the fact that by Federal Statute (Act Cong. May 14, 1898, C. 299, 30 Stat., 409, U. S. Comp. St., 1901, p. 1412), extending the homestead laws to the District of Alaska, a clear Congressional recognition of the principle may be discovered, in that it is therein specifically provided in Section 1, that nothing therein contained should "be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district."

It was held in that case that the upland owner's littoral access right did not invest him with the right to build a fish trap upon the tide lands in front of his premises, and in support of that holding the concluding paragraph of the opinion in *Shively v. Bowlby*, above set out, was approvingly quoted.

From that case and the other authorities considered, Judge Morrow concludes that

"While the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark."

That case was followed in *Decker v. Pacific Coast S. S. Co.*, 164 Fed., 974, where the rule of *Shively*

v. *Bowlby*, was again invoked. In that case the upland owner complained that her right to wharf out was interfered with and obstructed by a wharf structure to deep water beginning at a point below mean high water. Here the question was squarely presented as to whether there inheres in a littoral right of access a vested right to wharf out; in other words, whether the intervening tide lands are burdened with an exclusive easement in favor of the upland owner.

As to that this Court remarks that while a littoral owner's right of access to deep water is unquestioned,

"It cannot be ascertained from the allegations of the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant's premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated, rather than obstructed, by the maintenance of a wharf or other suitable structures for the accommodation of the public."

It was there held that the littoral right of access carries and includes no exclusive easement right over tide lands.

The principle announced in *Shively v. Bowlby* again finds recognition by this Court in *McCloskey v. Pacific Coast*, 160 Fed., 794, but the case there turned upon the question as to whether plaintiff was a littoral owner.

The subject was again considered by this Court in

Dalton v. Hazelet, 182 Fed., 561, and the rule of *Shively v. Bowlby* was again approvingly quoted. But in that case it was nevertheless held that the littoral owner's right of access included the right to wharf out over the tide lands to deep water. This conclusion seems so illogical in view of the premise adopted from *Shively v. Bowlby*, that we trust the Court will indulge a serious attempt to demonstrate its erroneousness. Judge Morrow reaches the conclusion thus:

"We think that, under the facts stated, the plaintiff is entitled to be relieved against this obstruction; that, while in a territory a grant of land bordering on or bounded by navigable waters conveys to the grantee no right or title to the shore or soil below high-water mark, nevertheless such a grantee has the right to a free and unobstructed access to such waters. 1 *Farnham on Waters*, 297. *But how shall the littoral owner have access to navigable waters where shoal water intervenes?"*

In answering that question this Court concludes that the right to wharf out must be said and held to inhere in the littoral access right to the end that such latter right may be rendered effective. From which it must follow that the intervening tide land is burdened with that servitude and the upland grant must be said to include that burden. It is submitted that the answer is forced to match the *assumption* that the littoral right of access would otherwise be ineffective. If the right to wharf out over government owned tide

lands inheres in upland ownership, then it cannot be true as held in this same case, that "a grant of land "bordering on and bounded by navigable waters conveys to the grantee *no right* or title to the shore "or soil below high-water mark," for if the right to wharf out inheres in the littoral access right, then the littoral owner enjoys a servitude in and over such tide lands, and that against the whole world, the Government included. It is submitted that the conclusion does not square with the premise.

Nor is the answer given by Judge Morrow to his self-propounded question necessary to the full effectiveness of the littoral access right. Where effective access to the navigable waters in front of an upland owner's premises requires a wharfing privilege, it should be sought and obtained from the owner of the tide lands to be crossed and upon which the wharf must be constructed and maintained. How otherwise can such a servitude be lawfully fastened upon the land of another?

The true answer to Judge Morrow's question is to be found in the Federal Statute (6 *Fed. Stat. Ann.*, 813, 30 Stat. L., 1151), where it is provided that wharfing privileges over Government tide lands may be obtained through the Secretary of War. This statute is yet another evidence of Congressional recognition of the unburdened character of the Government's ownership of its tide lands. It is there provided that a wharf may be constructed in a situation

like this only on plans recommended by the Chief of Engineers and after being duly authorized by the Secretary of War. Any other wharf construction upon Government tide lands is declared to be unlawful and expressly prohibited.

The answer to Judge Morrow's question which this Court adopted is based on the authority of a certain passage in the opinion of Mr. Justice Clifford in *Dutton v. Strong*, 66 U. S., 1, 17 L. ed., 29. This very passage, together with subsequent comments thereon by Mr. Justice Clifford in *St. Paul v. Schurmeier*, 66 U. S., 23, and Mr. Justice Miller in *Yates v. Milwaukee*, 77 U. S., 497, were considered, analyzed and distinguished in *Shively v. Bowlby*, and it was there held that the language employed in those cases, while not inaccurately stating the law as applied the facts there involved, afforded no warrant for the contention that the sovereign ownership of tide lands is in any wise burdened by an implied wharfing servitude in favor of the upland owner, and that the right to wharf out over such tide lands was subject to the grant and regulation of the sovereign owner.

This holding was followed by Mr. Justice Harlan in *Scranton v. Wheeler*, 179 U. S., 141, 45 L. ed., 126, where it was held that an upland owner was without cause of complaint on account of a Government pier constructed at deep water, although by reason of there being no connection with his upland, his littoral right of access was thereby cut off, and although he had

been awarded no compensation. Here again the cases of *Dutton v. Strong* and *Yates v. Milwaukee* were sharply distinguished and the passages above referred to held to be no more than *dicta*. In the Scranton case the cutting off of the littoral access right was justified upon the grounds that the pier was constructed by Government authority, upon Government shore lands and in the furtherance of public interests. Could it have been so held if it was considered that any easement right of wharfing out in furtherance of littoral access inhered in the upland ownership?

In that case it was held that there was no such right in the littoral owner as to entitle him to ejectment nor yet to compensation. This is a clear rejection and reversal of the passage in the *Yates* case which Mr. Justice Harlan denominates as dictum, to the effect that the right to wharf out in furtherance of a littoral right of access is property and once vested can only be taken from the owner in accordance with established law, and if necessary to be taken for public good, upon due compensation.

Furthermore, between the *Dalton* case and this case there is this dissimilarity in the findings. In the *Dalton* case the lower court found that the defendant's structure cut off plaintiff's littoral right of access to deep water. The finding was general and referred to the right of access as such, and in no way limited the right found to be thus cut off to the right of the upland owner to wharf out to deep water. In this

case, having found (Finding V, p. 45, Trans.) that appellee was building a large milling plant upon the upland and in furtherance of its construction and subsequent operation required access to deep water and that to serve that end it was necessary to build a wharf covering the entire 400 foot strip of tide lands in question, the court further found (Finding VIII, p. 49, Trans.) that if appellant completed the structure complained of it would "prevent the building of the wharf aforesaid, *and thus* cut off plaintiff's access to deep water." Evidently the only littoral right claimed and found here is the right to wharf out. That is entirely another thing from a littoral right of access, flowing from a different source and fructifying in a different use.

It is perfectly manifest that the granting of a right to wharf out over Government tide lands under the Federal Statute (6 *Fed. Stat. Ann.*, 813, 30 Stat. L., 1151) is made a matter of governmental discretion. The Secretary of War in this behalf acts for the Government which is the owner of the soil upon which the wharf must be constructed. It will not be disputed that that soil with the overlying waters has been by the sovereign devoted to public highway uses.

There is to be found no renouncement of or departure from such devotement in the policy represented by the ordained statutory method of granting wharfing privileges to littoral owners. The discretionary grant of such rights is clearly intended not only

to conserve the interests of the public but to enlarge the benefits the public may derive.

Wharfing rights are granted or denied by the Government in the interest of commerce and navigation. Clearly an enlarged public benefit as against that of the ordinary uses of such tide lands, is the *sine qua non* of a governmental grant of right to wharf out. That alone will justify the abridgement of the public use by the bestowal of an exclusive private right upon the upland owner. But it should be clear that it is this assumed public advantage from the proposed improvement rather than any recognized vested right in the upland owner that is intended to appeal to and control the governmental discretion and actuate in any given case a grant of wharfing rights.

The only right which the Government recognizes in the upland owner to wharf out, is the right to get a right if he can and does make a showing of probable enlarged public benefit resulting from the proposed improvement. It is the nature of that showing rather than the dignity of his standing as an upland owner that influences the governmental discretion.

Exclusive private rights are granted to the upland owner in such case evidently for the double reason, (1) because the upland owner's littoral right affords a natural outlet to the wharfing use, and (2) because such private use right over the tide lands crossed is essential to the private investment necessary to the improvement. These, however, are but secondary

considerations which are not even reached until the controlling consideration, i. e. that the proposed improvement will be a public benefit, has been affirmatively determined.

It thus appears, that as to wharfing out to deep water over this 400 foot strip of beach, the only present right appellee is shown to have is the right to get a right—or rather the right to try to get a right. The record is silent as to any right to wharf out having been secured by appellee. There is no hint of an application having been made to the appropriate governmental department looking to the securing of such right. There is nothing to show that plans for wharf improvements covering this entire 400 foot strip of beach, have been either prepared, or recommended by the Chief of Engineers, or authorized by the Secretary of War. There is nothing shown or found save appellee's desires in that regard. It is not even shown and found that it is appellee's intention to secure the right to wharf out.

Where then is the foundation for the injunctive relief awarded by the lower court? What is the present right in the appellee that has been either violated or threatened by the acts complained of? There can be no damage or injury either sustained or threatened such as will warrant injunction where no present right in plaintiff is shown.

Clearly no showing of intention merely will suffice. That would be true if the right to get a wharfing

privilege were absolute, and how much more where it is so clearly contingent, for *non constat* the Chief of Engineers may refuse to recommend the plan submitted, or the Secretary of War may refuse to authorize the project. As well might appellee ask for an injunction with no claim or showing of upland ownership, upon a mere profession of a desire to acquire the upland and an intention to do so if the present owner will consent to sell it at a reasonable price.

II.

The right of access shown was to a public use and any obstruction of such use may be redressed only at public suit.

The littoral right of access, considered as a private right, is no more than the right to come and go across the line that divides the shore land from the upland. That private right unquestionably inheres in the upland ownership. The private right of access, however, is an entirely different thing from the *use right* to which such access right admits the upland owner.

The waters of Gastineau Channel together with the tide lands that underlie them are a public highway. The title to the underlying tide lands is in the Government. Both the waters and the shore lands below mean high water, are by our laws devoted to public use. The character of that use is as varied as the vo-

cations and pleasures of the people for whose benefit the use has been created.

Navigability is a relative term. Waters and stages of water are navigable for a small launch or sailing vessel that would not be navigable for an ocean steamer. The public use rights of waters and beach include landing rights for craft of all kinds at all stages of water. Such landing rights include in turn the right to use the beach for passage between water and upland. At the line of mean high water this right of passage will be cut off by the private rights of the upland owner. But the public right of passage being along as well as across the beach, would allow any outlet to the upland not so abstracted.

It is to this general public use, then, that the littoral right of access admits the upland owner. His right would seem to be equivalent to that of an owner of property abutting on a public street, namely, the right of access to a public use. An obstruction of the street would not warrant a private action by such owner unless it was of such a character as to affect his access to the public use.

It has been expressly found by the lower court and held by this Court that the construction and maintenance of Franklin Street in front of this property did not affect appellee's right of access or amount to an obstruction of which appellee could be heard to complain. Why? Because, first, as a matter of fact and law it was a public use of that which was sub-

ject to such use, and second, it did not as a matter of fact obstruct appellee's access to such use.

In this view, the platforms built by appellant along the seaward side of Franklin Street cannot be said to interfere with appellee's right of access to the public use. The only effect of such platforms must be to limit and obstruct such public use, but as to that the public alone has the right to complain. If it is the *use* that is here obstructed and not appellee's right to be admitted to that use, then clearly the wrong may not be redressed at appellee's suit.

Counsel for appellee have throughout indulged the assumption, which the lower court seems to have shared, that the upland owner by virtue of his admitted right of access, has some sort of exclusive right to the use of the waters and beach in front of his premises; some right of use that is superior to the public right arising out of the highway uses to which by law such waters and beach have been devoted.

This obscuring thought of exclusive use rights arises, doubtless, from an unthinking assumption that the littoral access right is exclusive; that no one but the upland owner enjoys a right of access to the beach in front of his premises. But his right of access is exclusive only as to its being littoral. Actual access to the beach and water in front of his premises is open to the public generally on three sides.

Furthermore, in this case, the public enjoys full, free and actual access to the water and beach in front

of appellee's premises from both sides of Franklin Street. Here we have a street highway superimposed upon the water-beach highway, and their public uses mingling, there is no room for any exclusive use right in the upland owner. He cannot be accorded exclusive use rights for the double reason, (1) his right of access though littorally exclusive does not afford an exclusive admission to the uses, and (2) the uses are public highway uses.

The right to wharf out would be an exclusive private use, but, as we have seen, that right is the subject of specific grant from the tide land owner and does not inhere in the littoral right of access. Apart from that, what possible use rights can appellee be said to have in the waters and beach in front of these premises save those general highway rights which it shares with the public? If it must be said and held that appellee's littoral right of access implies no more than its right to an unobstructed admission to those general public uses, then this action must fail, for it sufficiently appears that the only effect of the platform complained of must be to limit and obstruct uses that are essentially and solely public.

It is therefore submitted that the judgment of the lower court should be reversed for the reason that the injunction was not warranted

First. Because appellee has no wharfing rights to be obstructed, and

Second. The obstruction complained of can only affect public uses, and can in no way affect appellee's littoral right to be admitted to those uses.

Respectfully submitted.

METSON, DREW &
MACKENZIE, and
HORATIO ALLING,
Of Counsel for Appellant.

THIS IS TO CERTIFY that in my judgment the foregoing Supplemental Petition for Rehearing is well-founded and it is not interposed for delay.

HORATIO ALLING,
Of Counsel for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

Filed

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No. 2642

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

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ton,

Attorney for Defendant and Defendant in
Error. [2*]

*In the Superior Court of the State of Washington,
for the County of Stevens.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Complaint.

The plaintiff for its cause of action alleges:

I.

That plaintiff is a corporation organized under
the laws of the State of Wisconsin and has duly com-
plied with the laws of, and is authorized to do busi-
ness in, the State of Washington.

*Page-number appearing at foot of page of original certified Record.

II.

That by Act of Congress of July 2, 1864 (13 Stats. page 365), incorporating the Northern Pacific Railroad Company, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of its railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty (20) alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten (10) alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, [3] or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

III.

That on October 4, 1880, the Northern Pacific Railroad Company definitely located that portion of its line of road from Spokane Falls to Wallula opposite the lands in controversy, and filed a plat thereof in the office of the Commissioner of the General Land Office.

IV.

That on November 13, 1880, the Commissioner of the General Land Office withdrew from the public domain all odd numbered sections within forty (40) miles of said line so definitely located, and transmitted his withdrawal order to the local land office at Colfax, Washington, which order was received and filed in said local land office November 30, 1880; Colfax, Washington, then being the local land office at which the public lands of the United States surrounding the lands in controversy were subject to entry.

Thereafter the Northern Pacific Railroad Company duly constructed its road on the line so definitely located, and that portion of its road opposite the lands in controversy, to wit, from Eight Mile Prairie to Wallula, was examined by Commissioners appointed by the President of the United States for that purpose, whose report was approved and said constructed road accepted by the President of the United States.

V.

That on July 2, 1864, and on October 4, 1880, the South half (S $\frac{1}{2}$) of the Northwest quarter (NW $\frac{1}{4}$) of Section Thirteen (13), Township Twenty-eight (28) North, Range Thirty-nine (39) East, in the County of Stevens, in the State of Washington, [4] was public land of the United States, not mineral, within forty (40) miles of the line of the Northern Pacific Railroad as definitely located October 4, 1880, to which the United States had full title on both said dates, and said land was not reserved, sold,

granted, or otherwise appropriated and was free from pre-emption and all other claims and rights.

VI.

That the said lands, after the definite location of said line as aforesaid, were duly conveyed by the Northern Pacific Railroad Company to the plaintiff.

VII.

That the plaintiff is the owner in fee simple of said lands and entitled to the possession thereof, but the defendant unlawfully withholds possession to plaintiff's damage, in the sum of Five Hundred (\$500.00) Dollars, and for costs.

WHEREFORE, plaintiff demands judgment that the defendant deliver up possession of the premises to the plaintiff, and for damages for withholding the same, in the sum of Five Hundred (\$500.00) Dollars, and for costs.

(Signed.) CANNON & FERRIS,
CHARLES DONNELLY,
Attorneys for Plaintiff. [5]

State of Washington,
County of Spokane,—ss.

C. R. Lonergan, being first duly sworn, upon oath deposes and says: That he is General Agent of and for the Northern Pacific Railway Company, a corporation, plaintiff in the above-entitled action, and has his office as such general agent and resides in the City of Spokane, Washington; that he makes this affidavit for and on behalf of said corporation; that he has read the above and foregoing complaint, knows the contents thereof and believes the same to be true.

(Signed.) C. R. LONERGAN.

Subscribed and sworn to before me this 10 day of March, 1915.

(Signed.) WALTER A. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane. [6]

*In the Superior Court of the State of Washington,
for the County of Stevens.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Petition for Removal.

Your petitioner, George F. Wismer, defendant herein, respectfully shows to this Court:

1. That the matter and amount in controversy in the above-entitled cause, exclusive of interest and costs, exceed the sum of Three Thousand Dollars (\$3,000.00).

2. That the suit herein is of a civil nature at law, arising under the laws of the United States in this: That the plaintiff claims to be the owner in fee simple of the premises described in the complaint under and by virtue of the grant to its predecessor from the United States under the Act of Congress approved July 2, 1864 (13 Stats., L. 365), plaintiff claiming that on the 4th day of October, 1880, its predecessor in interest, the Northern Pacific Railroad Company, definitely located that portion of its line opposite the lands in controversy and filed a

plat thereof in the office of the Commissioner of the General Land Office; and further claiming that at the date of the filing of said map of definite location, the land described in the complaint was public land of the United States, not mineral, within forty (40) miles of the Northern Pacific Railroad as so definitely located, to which the [7] United States had full title, and which land was not reserved, granted, or otherwise appropriated, and was free from pre-emption and all other claims and rights.

3. That the defendant claims to be entitled to the possession of said premises under and by virtue of a homestead entry, duly made and received at the United States Land Office in the City of Spokane, State of Washington, on or about the 2d day of April, 1910; and defendant further claims that the land described in the complaint herein on or about the 4th day of October, 1880, had been, by the United States, reserved from sale, grant and other appropriation for the use and benefit of the Spokane Indians as a reservation and continued to be such until the Executive Proclamation of the President, dated the 22d day of May, 1909, opening up said reservation to entry.

4. That in compliance with such Executive Proclamation, the defendant did make his entry in all respects as required by law in the United States Land Office, in the City of Spokane, State of Washington, and thereafter entered in to the possession of said premises, and has ever since so remained; that defendant has complied with all the laws of the United States relating to the entry of public

lands, and the rules and regulations of the Department of the Interior relating thereto, and that on the 9th day of April, 1913, a patent covering the land described in the complaint was duly issued by the United States of America to said George F. Wismer, and defendant is entitled to the possession of said premises.

5. That plaintiff and defendant herein have entered into a stipulation, which is attached hereto, agreeing that this Court enter an order removing this case to [8] the District Court of the United States for the Northern Division of the Eastern District of Washington, and defendant prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to cause the record herein to be removed into the District Court of the United States for the Northern Division of the Eastern District of Washington.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney.

State of Washington,
County of Spokane,—ss.

Francis A. Garrecht, being first duly sworn, deposes and says: That he is the United States Attorney for the Eastern District of Washington, and as such was directed by the Attorney General of the United States to appear for the defendant herein; that affiant makes this verification for the reason that defendant is not now within the County of Spokane; that the foregoing petition is true to the best of his knowledge, except as to matters therein alleged upon information and belief, and as to those

matters he believes it to be true.

(Signed.) FRANCIS A. GARRECHT.

Subscribed and sworn to before me this 15th day
of March, A. D. 1915.

[Seal] (Signed.) J. E. McGOVERN,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington. [9]

*In the Superior Court of the State of Washington,
in and for the County of Stevens.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Stipulation for Removal.

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto, by their respec-
tive attorneys, that this Court make and enter an
order in the above-entitled cause removing said
case to the District Court of the United States for
the Northern Division of the Eastern District of
Washington.

Dated this 15th day of March, A. D. 1915.

(Signed.) EDWARD J. CANNON,
Attorney for Plaintiff.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney, and Attorney for Defend-
ant. [10]

*In the Superior Court of the State of Washington,
for the County of Stevens.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Order of Removal.

The defendant herein having within the time provided by law filed his petition for removal of this cause to the District Court of the United States for the Northern Division of the Eastern District of Washington, and having at the same time filed a stipulation of the parties to said action, whereby it is agreed that this Court make and enter an order herein removing this cause to the said District Court of the United States for the Northern Division of the Eastern District of Washington.

NOW, THEREFORE, the Court being fully advised in the premises, it is

CONSIDERED and ORDERED that this cause be removed for trial to the District Court of the United States for the Northern Division of the Eastern District of Washington, pursuant to the statute of the United States, and that all other proceedings of this court be stayed.

Done in open court this 15th day of April, A. D. 1915.

(Signed.) W. H. JACKSON,
Judge. [11]

[Certificate of Clerk to Copy of Order of Removal.]

State of Washington,

County of Stevens,—ss.

I, L. C. Richardson, County Clerk and Ex-Officio Clerk of the Superior Court of the said County and State, do hereby certify that the above and foregoing is a true and correct copy of Order of Removal of case for trial to District Court of the U. S. for Northern Division of E. District of Washington, in the cause wherein Northern Pacific Railway Company is Plaintiff, and George F. Wismer is Defendant, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of April, A. D. 1915.

[Superior Court Seal]

(Signed.) L. C. RICHARDSON,

County Clerk.

By E. C. Richardson,

Deputy. [12]

[Certificate of Clerk to Transcript of Record on Removal.]

*In the Superior Court of the State of Washington,
in and for the County of Stevens.*

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

State of Washington,
County of Stevens,—ss

I, L. C. Richardson, Clerk of the Superior Court of the State of Washington for the County of Stevens, do hereby certify that the above and foregoing Summons and Complaint, Petition and Stipulation for Removal, and Order of Removal, are all the files in the above-entitled cause, as the same now appear on file and of record in my office in Appearance Docket No. 12, on page six.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of April, 1915.

[Superior Court Seal]

(Signed.) L. C. RICHARDSON,

Clerk.

By E. C. Richardson,

Deputy.

[Endorsements]: Transcript on Removal. Filed in the U. S. District Court for the Eastern District of Washington. April 16, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [13]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Answer.

For answer to the complaint of plaintiff herein:

1. Defendant denies each and every allegation in paragraph six (6) thereof.

2. Defendant admits that he is in possession of the land described in the complaint and that he withholds possession thereof from the plaintiff, but alleges the same to be under claim of right and lawfully, and denies that the plaintiff is the owner in fee simple of said premises, or is entitled thereto, or to the possession thereof.

Further answering said plaintiff, defendant avers and alleges:

3. That for many years prior to August 18, 1877, and from time immemorial, the lands described in the complaint, and other adjoining lands around and about, were Indian lands, occupied, used, enjoyed and claimed by the Indians, and that during all of said time none of the rights and claims of said Indians in and to the said lands and premises had been extinguished.

4. That to preserve the peace, to promote the welfare of the Indians and, as well, for the purpose of extinguishing all their rights in other portions of the public domain, it was the policy of the Executive [14] Department of the Government of the United States to gather all roving bands of Indians on permanent reservations, and to that end the War Department and the Department of the Interior were directed to and did act and co-operate together.

5. That in August, 1877, one E. C. Watkins, who was then and there an Indian Inspector of the Department of the Interior, acting in his official capacity, and by the direction of the Secretary of the Interior, and with the approval of the President of the United States, held conference with various northern Indian tribes, some of whom were occupying the eastern portion of the then Territory of Washington.

6. That the said E. C. Watkins, acting in his official capacity, as aforesaid, on August 18, 1877, entered into an agreement in writing with the chiefs and members of the Spokane tribe of Indians, a copy of which agreement is hereto attached and marked exhibit "A."

7. That the said agreement was entered into for the purpose of collecting the said Indians belonging to the said tribe on the reservation described in said agreement, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of the said Indians in all other lands not within the said reservation; and as a means of influencing said Indians to continue in friendly

relations with the whites, to remain in peace with the Government of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

8. That in pursuance of said agreement, the Indians already on said lands agreed to remain thereon, and others [15] not so located agreed to go upon said lands, which it was agreed should be and remain a reservation for such Indians.

9. That in the summer of 1877, certain Indian bands and tribes of the Northwest country had begun hostilities upon, and had committed depredations against white settlers in the Indian Country in Eastern Washington, Oregon and Northern Idaho. And for five or six years thereafter said Indians continued to menace the white population living in said territory.

10. That the said Indians who had gone upon the warpath sought to induce others of their race who were engaged in peaceful pursuits to join in their wars, hostilities and depredations.

11. That during all of the times mentioned, many of the Indians belonging to said peaceful bands and tribes were living on, around and about the lands described in the complaint, and had actually made their homes thereon, and some of them had made valuable improvements.

12. That said E. C. Watkins, Indian Inspector as aforesaid, acting in his official capacity, pursuant to said agreement prior to November 26th, 1877, located the Spokane Tribe of Indians on the said reservation, and said Indians remained upon and continued in

use, occupancy, possession and enjoyment of said tract of land described in said agreement as their reservation continuously thereafter until the year 1910.

13. That about August, 1880, white settlers began to encroach upon the said lands so claimed by the said Indians as their reservation.

14. That on or about the 3d day of September, 1880, one H. H. Pierce, First Lieutenant of the 21st Infantry [16] of the United States Army, by command of Brigadier-General Howard of the United States Army, and under the direction and authority of the Secretary of War, duly and legally, by order, set apart as a reservation for said Indians, the tract of land above described, including the premises mentioned in the complaint, a copy of which said order is hereto attached, marked exhibit "B," and made a part hereof; that such order was made in pursuance of, and to carry out the said agreement made between said Indians and the United States, acting by and through said E. C. Watkins, Indian Inspector as aforesaid.

15. That the lands so reserved, which included the lands described in the complaint, were so set apart under authority of the President for the exclusive use and occupancy of the Indians; that it was done for the care and protection of the Indians, out of public necessity and for the preservation of the public peace.

16. That the said agreement with the Indians, and said order creating and setting aside said tract of land as a reservation was recognized and ratified by the Secretary of War and the Secretary of the In-

terior, and approved by the President of the United States, and on January 18, 1881, the formal order and proclamation thereof was made, a copy of which is hereto attached, marked exhibit "C."

17. That all of the aforesaid matters were made known to Congress and were of public notoriety, and the reservation so established on September 3, 1880, was recognized as such continuously thereafter until the Act of May 29, 1908.

18. That the lands described in the complaint were [17] a part of said reservation and as such continued to be a part of the Public Indian Reservation, and were actually, uninterruptedly and continuously set apart, occupied, used, enjoyed and claimed by the Indians from a time preceding that when the railroad company's line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office, to and including the time of approval of said Act of May 29, 1908.

19. That at the time when such definite location was made, to wit, October 4, 1880, the lands described in the complaint were, by reason of the premises, reserved and appropriated for, and subject to the claims and rights of said Indians, and occupied by them, and no right, title or interest whatsoever therein passed to the company under the Act of July 2, 1864, or otherwise.

20. That under the Act of Congress approved May 29, 1908 (35 Stats. L. 458), and the proclamation of the order of the President of the United States of May 22, 1909, the said tract of land became subject to homestead entry on May 1, 1910; that on

or about April 2, 1910, at the United States Land Office, in the City of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint, which entry was duly accepted by the register and receiver of said land office.

21. That on April 9, 1913, patent to said land was issued to this defendant, and in virtue of his said entry and the patent thereafter issued to him, defendant entered into possession of said premises on or about April 2, 1910, and ever since has continued to and now does occupy the same. [18]

For another, further, separate and second defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

22. That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L., 365); but said claim was denied and on appeal decided by the Secretary of the Interior adversely to the contention of plaintiff herein, a copy of which decision is hereto attached and marked exhibit "D."

For another, further, separate and third defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,

19, 20, and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

23. That the recognition of and compliance with the said agreement made with said Indians, and the setting aside of a permanent reservation in pursuance thereof, and the determination of the rights of the Indians therein were political questions which were passed upon by the President and the Congress and the settlement of which is not subject to change or review by the courts. [19]

For another, further, separate and fourth defense:

Defendant reaffirms and realleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 in words and figures as in the first defense heretofore set forth, and each and every allegation therein contained and to the same effect as if here restated.

24. That defendant ought not now be permitted to contend that the lands described in the complaint, or any of the other lands comprised in the Spokane Indian Reservation were subject to the grant of the Northern Pacific Railroad Company on October 4, 1880, for the reason that relying upon the agreements, orders, acts and proclamations aforesaid, the said Indians in 1877 relinquished all their right to the other lands in Washington Territory and retired upon and established themselves upon the said Spokane Indian Reservation, and thereby the Indian title to the other lands within the grant was extinguished and the predecessor in interest

of the said plaintiff, with full knowledge of the facts, and well aware that the said Indians believed that the lands set aside and reserved for them comprised a valid Indian Reservation, and relying thereon had relinquished all claim to other lands within said grant, acquired the immediate occupation, use, enjoyment, and title of lands within the grant so relinquished by said Indians which it otherwise would not have had, and said plaintiff should now be estopped to claim any of the lands embraced in the Spokane Indian Reservation.

WHEREFORE, Defendant prays that plaintiff take nothing herein, and that he recover his costs and [20] disbursements.

(Signed.) FRANCIS A. GARRECHT,
United States Attorney.

United States of America,
Eastern District of Washington,—ss.

Francis A. Garrecht, being first duly sworn, deposes and says:

That he is the attorney for the defendant herein; that the defendant is not now within the County of Spokane; that the affiant has read the foregoing answer, knows the contents thereof and believes the same to be true

(Signed.) FRANCIS A. GARRECHT.

Subscribed and sworn to before me this 20th day of April, A. D., 1915.

(Signed.) W. H. HARE,
Clerk United States District Court, Eastern District
of Washington. [21]

**Exhibit "A" [to Answer—Agreement Between
Indians and Indian Inspector].**

IN COUNCIL AT SPOKANE FALLS, W. T.

August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:

Names.

E. C. WATKINS,	Whistle-poo-lum	his X Spokane
U. S. Indian Inspector.		mark
	Quis-e-me-ow	his X Spokane
		mark
	Ah-mi-melschin	his X Spokane
		mark
FRANK WHEATON,	Cos-to-akan	his X Spokane
Bt. Major Gen. U. S. Army.		mark
Col. 2nd Infantry.		his
	Ora-pa-han	X Spokane
M. C. WILKINSON,		mark
Bvt. Capt. U. S. Army.		his
Aide de Camp.	Paul	X Ora-pa-han.
		mark

[22]

Exhibit "B" [to Answer—Order Directing Protection of Certain Territory Against Settlements by Others Than Indians].

MILITARY ORDER.

**HEADQ'RS DEPT. OF THE COLUMBIA,
IN THE FIELD, SPOKANE FALLS, W. T.**

September 3, 1880.

(FIELD ORDERS—No. 8.)

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians the following described territory, to wit: Commencing at the mouth of Cham-a-kane Creek, thence north eight miles in direction of said creek, thence due west to the

Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive order in their case and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above-described territory, being still unsurveyed, be protected against settlements by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding Officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier-General Howard.

H. H. PIERCE,
1st Lieut. 21st Infantry,
Acting Aide-de-Camp.

Official. [23]

Exhibit "C" [to Answer—Executive Order Setting Aside and Reserving Certain Lands for Spokane Indians].

Executive Mansion,
January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the East bank of said creek to where it

enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence East along said parallel to the place of beginning.

R. B. HAYES. [24]

Exhibit "D" [to Answer—Decision of Secretary of Interior].

March 7, 1910.

The Commissioner of the General Land Office.

Sir:

This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said company to 64,000 acres of land, falling within the place limits of the grant made to said company by the Act of July 2, 1864 (13 Stats., 365), because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 (35 Stat., 458).

It appears from your said office decision, and it is not disputed, that in August 1877, E. C. Watkins, an Indian Inspector of this Department, had a conference with the Spokane Indians, and set apart, or promised to have set apart, for their use, a certain tract of land; that on November 26, 1877, said Inspector made a report to the Commissioner of Indian Affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said re-

port he refers to the Colville Indian Reservation, to to which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians north of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Simms, United States Indian Agent, Colville Agency, Washington, shows that the Spokane Indians, numbering 685, "are living along the Spokane River and vicinity, from Spokane Falls to its junction with the Columbia," these being the same lands set apart [25] for them by Inspector Watkins; and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant, 21st Infantry, by command of Brigadier-General Howard, proclaimed, in Special Field Order No. 8, Headquarters, Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians, describing the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace until the pledge of the Government should be fulfilled or other arrangements accomplished. The Executive order setting apart said Indian reservation is dated January 18, 1881, and described the lands practically the same

as in said Order No. 8.

The definite location of the Northern Pacific Railway Company's line of road, coterminous with and opposite the lands in question, was made October 4, 1880. It thus appears that at the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation, created by the said H. H. Pierce, September, 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation, January 18, 1881.

Your office decision holds that the negotiations of the said E. C. Watkins, the facts stated in the said report of John A. Simms, United States Indian Agent, and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the [26] railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal except the case of *Buttz v. Northern Pacific Railway Company*, 119 U. S. 55, which, it is contended, is authority for the contention of the company that these lands had not been withdrawn prior to January 18, 1881, and that they were therefore subject to the company's grant, October 4, 1880. The case cited is not in point, and furnishes no authority for the contention made.

The fact of the negotiations and of the military order above referred to is not denied upon the appeal, but the legal effect of these proceedings is disputed.

Upon a careful consideration of the subject, it is

believed that these proceedings constituted such reservation of the land in question as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed, and your office will proceed to the disposition of these lands in accordance with the provisions of the act of May 29, 1908, *supra*.

Very respectfully,
(Signed) FRANK PIERCE,
First Assistant Secretary.

[Endorsements]: Due, legal and timely service of the foregoing Answer is admitted to have been made April 20, 1915.

E. J. CANNON,
Attorney for Plaintiff.

Answer. Filed April 20, 1915. W. H. Hare,
Clerk. By S. M. Russell, Deputy. [27]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Reply.

Plaintiff for reply to the answer of the defendant herein:

Except in so far as defendant's answer admits the allegations of plaintiff's complaint, plaintiff denies each and every allegation, averment, matter and thing in defendant's answer contained whether as therein stated or otherwise.

WHEREFORE, plaintiff prays judgment as in its complaint asked.

(Signed.) EDWARD J. CANNON,
GEORGE M. FERRIS,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

C. R. Lonergan, being first duly sworn, upon oath deposes and says: That he is general agent of and for the Northern Pacific Railway Company, a corporation, plaintiff in the above-entitled action, and has his office as such general agent and resides in the city of Spokane, Washington; that he makes this affidavit for and on behalf of said corporation; that he has read the above and foregoing reply, knows the contents thereof and believes the same to be true.

(Signed.) C. R. LONERGAN, [28]

Subscribed and sworn to before me this 5th day of May, 1915.

(Signed.) WALTER A. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Reply. Served May 5th, 1915. Francis A. Garrecht, U. S. Attorney. Filed May 5, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [29]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Stipulation Waiving Jury.

It is hereby stipulated and agreed by and between E. J. Cannon, attorney for the plaintiff herein, and Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and attorney for the defendant herein, that this case may be submitted for determination to the Court without the intervention of a jury, in accordance with the provisions of Section 649 of the Revised Statutes of the United States.

Dated this 24th day of June, A. D. 1915.

(Signed.) EDWARD J. CANNON,

Attorney for Plaintiff.

(Signed.) FRANCIS A. GARRECHT,

United States Attorney and Attorney for Defendant.

[Endorsements]: Stipulation Waiving Jury.
Filed in the U. S. District Court for the Eastern District of Washington, June 24, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [30]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Opinion.

CANNON & FERRIS and CHARLES DONNELLY, for Plaintiff.

FRANCIS A. GARRECHT, U. S. Atty., for Defendant.

RUDKIN, District Judge.

This is an action of ejectment to recover eighty acres of land forming part of an odd section within the limits of the Spokane Indian Reservation as established by the Proclamation of the President of January 18, 1881. The action was commenced in the Superior Court of Stevens County, but was removed to this court on the petition of the United States Attorney for this district, appearing for the defendant, on the ground that a federal question was

involved. By written stipulation of the parties a jury was waived and the case submitted to the Court on an agreed statement of facts. Both parties claim title directly and immediately from the United States, and their respective claims may be thus briefly stated in chronological order.

First, as to the claim of the plaintiff.

By Section 3 of the act of Congress of July 2, 1864 (13 Stat., 65) there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to [31] to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company might adopt, through the Territories of the United States, and Ten alternate sections of land per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof, the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption, or other claims or rights at the time the line of said railroad was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. The land in controversy *in* nonmineral in character and is within forty miles of the line of road as definitely located opposite thereto by a plat filed in the office of the Commissioner of the

General Land Office on the 4th day of October, 1880. Thereafter the grantee constructed and completed its line of road opposite the lands in controversy, and the same was examined and approved by the commissioners appointed by the President of the United States. The plaintiff is the successor in interest to the Northern Pacific Railroad Company and has an indefeasible title to the land if the United States had full title thereto and the same was not reserved, sold granted, or otherwise appropriated, and was free from preemption and other claims and rights at the time the line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office.

Second, as to the claim of the defendant.

On and prior to the 18th day of August, 1877, the land in controversy, and other surrounding lands, were unsurveyed public lands of the United States to which the Indian title or right of occupancy had never been extinguished. On the latter date [32] E. C. Watkins, an Indian Inspector attached to the Department of the Interior, and acting under instructions from the Secretary of the Interior, held a conference with the chiefs and head men of the Spokane Tribe of Indians with a view of inducing them to give up their nomadic life, cease their warfare on the whites, establish permanent homes, and take up agricultural pursuits on a reservation that the Government promised to set apart for them. As a result of this conference or council the following agreement was signed by the chiefs and head men of the tribe:

“We, the undersigned chiefs and head men of the Spokane Tribe of Indians, for ourselves and our people hereby agree to accept the following described land for our reservation; beginning at the Source of the Chimokan Creek in Washington Territory, thence down said Creek to the Spokane River, thence down said river to the Columbia River; thence up the Columbia River to the Mouth of Nim Chin Creek, thence Easterly to the place of beginning.”

“And we do further agree to go upon the same by the first of November next, with a view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and Offices acting thereunder.”

Thereupon the Indian Inspector removed all Indians of the Spokane Tribe not already living within the limits of the reservation thus agreed upon to the reservation, and on the 24th day of November, 1877, reported his doings to the Commissioner of Indian Affairs. On the 23rd day of January, 1878, the Secretary of the Interior communicated this report to the United States Senate in response to a resolution of that body, and the same was referred to the committee on Indian Affairs and ordered printed. During the month of August, 1880, the Indians on the reservation were much disturbed by the attempts of squatters to locate on the land within the limits of

the reservation thus set apart for them, and on the 3rd day of September, 1880, Brigadier General Howard of the Department of the Columbia, with the concurrence and approval of the Secretary of War and the Secretary of the Interior, promulgated the following Order: [33]

“Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit:

“Commencing at the Mouth of the Cham-a-Kane Creek; thence North Eight Miles in direction of said Creek; thence due West to the Columbia River; thence along the Columbia and Spokane Rivers to the point of beginning—The Indians are still expecting the executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits; it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

“The Commanding officers of Forts Coeur d’Alene and Colville and Camp Chelan are charged with the proper execution of this order.”

By proclamation of January 18, 1881, the Spokane

Indian Reservation was established with the following boundaries:

“Commencing at a point where the Chema-kane Creek crosses the Forty-eighth parallel of latitude; thence down the East bank of said Creek to where it enters the Spokane River; thence across said Spokane River westwardly along the Southern Bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its Western bank to a point where such river crosses the said Forty-eighth parallel of latitude; thence East along said parallel to the place of beginning.”

I understand there is no material difference between the boundaries of the reservation as defined in the agreement of August 18, 1877, the order of September 3d, 1880, and the proclamation of January 18, 1881, and that the land in controversy is within all three. Ever since the latter part of 1877 the Spokane Tribe of Indians have remained upon and claimed the lands within this reservation as their reservation by reason of the different agreements, orders, and proclamation herein set forth and have made their homes thereon cultivating the land in Indian fashion.

By Act of Congress of May 29, 1908 (35 Stat., 458) the Secretary of the Interior was authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who might rightfully belong on the Spokane Indian Reservation and who had not there-

tofore received [34] allotments. The Act further provided that upon the completion of the allotments the Secretary of the Interior should classify the surplus lands as agricultural and timber lands, and that the lands classified as agricultural lands should be open to settlement and entry under the homestead laws of the United States by a proclamation of the President which would prescribe the time and the manner in which the land might be settled upon, occupied and entered by persons entitled to make entry thereof, and that no person should be permitted to settle upon, occupy or enter any of such lands except as prescribed in the proclamation. By other provisions of the act the United States acted as trustee for the Indians in disposing of the Surplus lands and the purchase price of \$5.00 per acre was credited to the Spokane Tribe. The allotments were made, the lands classified, the proclamation issued, and defendant made entry of the land in controversy, complied with all the requirements of the Homestead Law, and received a patent.

Under the foregoing facts did the United States have full title to the lands embraced in the Spokane Indian Reservation, and were the same free from preemption or other claims and rights at the time the line of road was definitely fixed and the plat filed in the office of the Commissioner of the General Land Office. It is firmly established by repeated decisions of the Supreme Court that "only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in

behalf of any individual or corporation at the time of the definite location of its road.”

No. Pac. Rd. vs. Musser Sauntry Co. 168 U. S., 604,609.

Northern Lumber Company vs. O’Brien, 204 U. S., 190, and cases cited. [35]

It is equally well settled that the validity of the right or claim is not material.

“It was not the intention of Congress to open a controversy between the claimant and the Railroad company as to the validity of the former’s claim; it was enough that the claim existed, and the question of the validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard.”

United States vs. So. Pac. Rd. 146 U. S. 570, 606.

“This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means ‘lawfully’ claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudice any claim to be lawful, but submitted them all for adjudication.”

Newhall vs. Sanger, 92 U. S. 761, 765.

“Whether or not valid is immaterial to the question here; for, as has often been decided by the Supreme Court, it is not the validity of such claim, but the fact that it existed at the time of the definite location of the railroad, that excluded

the lands in controversy from the category of 'public lands' to which alone the company's grant attached."

United States vs. So. Pac. R. Co. 76 Fed., 134, 136, See also, Northern Lumber Co vs. O'Brien, *Supra*, and cases cited.

In the light of the foregoing decisions it seems manifest that the Spokane Tribe of Indians had a special claim to the lands embraced in this reservation at the time of the definite location of the railroad such as would except them from the operation of the grant to the company. Whether that claim was a valid one, enforceable against the United States, we need not enquire. It is sufficient that the claim existed. The lands had been set apart for the use of the Indians by both the civil and military authorities of the Government; the officers of the Government represented to the Indians that they came among them for the purpose of establishing a reservation, armed with authority from the Secretary of the Interior and the President of the United States; the Indians relied upon these representations, moved onto the reservation, established homes there, and relinquished their more general claim to [36] other public lands in the vicinity. After all this had transpired the Government was bound, in equity and good conscience, to recognize the claim of the Indians and confirm the acts of its officers, and did so at an early opportunity by public proclamation of the President. It is idle, now to enquire whether these officers had technical authority under the law to establish a reservation. The parties were not dealing on an equal footing. A

powerful Government was treating with an inferior race, and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders.

If the lands were excepted from the operation of the grant at the date of definite location, by reason of the claim of the Indians, they were excepted for all purposes and for all time.

Nor. Pac. Rd. Co. vs. Sanders, 166 U. S., 620, and cases cited.

There is nothing in the case of Northern Pacific Railway Co. vs. Mitchell, 208 Fed., 469, or Buttz vs. Nor. Pac. Rd. Co. 119 U. S., 55, in conflict with these views. In the former the defendant claimed that the lands were reserved by reason of the report of the Indian Inspector and the order of General Howard, but the Court ruled otherwise. The special claim of the Indians was not advanced or relied upon: In the latter the Court was considering only the general right of occupancy of the Indians.

Having reached the conclusion that the land in question was excepted from the grant by reason of the claim of the Indians it becomes unnecessary to inquire whether the Government might not set apart as an Indian Reservation any lands to which the Indian title had not been extinguished, even after the map of definite [37] location had been filed.

Much might be said in support of that right in the

Government, but I will not discuss the question further.

For the foregoing reasons, I am of the opinion that the plaintiff has no title to the land involved in this suit under the grant of its predecessor in interest or otherwise. Inasmuch as the case was submitted upon an agreed statement of facts I deem it unnecessary to make any findings except the general one, that the plaintiff is not the owner or entitled to the possession of the premises described in the complaint. To this finding the plaintiff is allowed an exception as well as an exception to the refusal of the Court to make the opposite finding. My attention having been called to the fact that the defendant died since the submission of the case, and that no personal representative has been appointed, judgment will be entered as of June 24, 1915, the date of submission. Let findings and judgment be prepared accordingly.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington, August 11, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [38]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury; and E. J. Cannon, Esquire, appearing as attorney for the plaintiff herein, and Francis A. Garrecht, Esquire, United States Attorney, appearing for the defendant, and from the evidence submitted, the Court makes the following

FINDINGS OF FACT.

That the plaintiff has not any interest in or title to any of the lands and premises described in the complaint and is not the owner or entitled to the possession thereof; (Plaintiff excepts and exception allowed.)

and as

CONCLUSIONS OF LAW.

That plaintiff's action should be dismissed and defendant recover his costs. (Plaintiff excepts and exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Findings of Fact and Conclusions of Law. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [39]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Judgment.

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury; and E. J. Cannon, Esquire, appearing as attorney for the plaintiff herein, and Francis A. Garrecht, Esquire, United States Attorney, appearing for the defendant, and the evidence being closed and argument of counsel having been made and the cause having been submitted for

consideration and decision, and the Court being fully advised in the premises,

WHEREFORE, it is considered, ordered and adjudged that plaintiff take nothing herein; that this action be dismissed and that defendant recover his costs, taxed at \$——; and that this judgment be entered as of date July 24, 1915.

Done in open court this 13th day of August, 1915.

(Plaintiff excepts and exception allowed.)

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [40]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

**Findings of Fact and Conclusions of Law
(Plaintiff's Proposed).**

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, a stipulation having been theretofore signed and filed waiving a trial by jury, and Mr. E. J. Cannon

appearing as attorney for plaintiff herein and Mr. Francis A. Garrecht, United States Attorney, appearing for the defendant, and from the evidence submitted, the Court makes the following

FINDING OF FACT.

That the plaintiff is the owner and entitled to the possession of the lands and premises described in the complaint and that the defendant has no interest therein and no right to the possession thereof; and as (Refused; exception allowed.)

CONCLUSION OF LAW.

That said plaintiff is the owner in fee simple and entitled to the exclusive possession of the property described in the complaint, and that said plaintiff recover of defendant its costs.

(Refused; exception allowed.)

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Findings of Fact and Conclusions of Law. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [41]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Judgment (Plaintiff's Proposed).

This cause came on regularly for trial on the 24th day of June, A. D. 1915, before the Court without a jury, stipulation having been theretofore signed and filed waiving a jury trial, Mr. E. J. Cannon appearing as attorney for the plaintiff herein and Mr. Francis A. Garrecht, United States Attorney, appearing for the defendant, and the evidence being closed and argument of counsel having been made and the cause having been submitted for consideration and decision, and the Court being fully advised in the premises;

WHEREFORE, it is considered, ordered and adjudged that the plaintiff is entitled to a judgment against the defendant quieting the title to the property described in said complaint in the plaintiff, free from any right or claim thereto in the defendant, and that the plaintiff is entitled to its costs taxed at the sum of \$——, and that this judgment be entered as of date July 24, 1915.

(Refused; exception allowed.)

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Judgment. Filed August 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [42]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Petition for Substitution.

The petition of Emma A. Wismer respectfully shows to the Court that George F. Wismer, the defendant in the above-entitled action, is dead, having departed this life on July 25th, 1915.

That your petitioner is the proper representative and is the successor in interest to the said deceased party in the subject matter of said above-entitled action, and your petitioner, Emma A. Wismer, now voluntarily and respectfully asks to be admitted as a party to the said above-entitled action and that she be substituted as defendant therein.

(Signed) EMMA A. WISMER,
Petitioner.

State of Washington,
County of Spokane,—ss.

Emma A. Wismer, being first duly sworn, on oath deposes and says that she is the petitioner named in the foregoing petition; that she knows the contents thereof and the same are true as she verily believes.

(Signed) EMMA A. WISMER,

Subscribed and sworn to before me this 19th day of August, 1915.

(Signed) FRANCIS A. GARRECHT,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Petition of Emma A. Wismer, to be Substituted as Defendant. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [43]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Order Substituting Emma A. Wismer as Defendant.

Now, on this day, coming on to be heard the petition of Emma A. Wismer, asking that she be admitted as a party to the above-entitled action and substituted as the defendant therein, and Cannon & Ferris, attorneys for plaintiff, consenting thereto, and it appearing to the Court that the above-named defendant, George F. Wismer, is dead, having departed this life on July 25th, 1915, and that said Emma A. Wismer is the proper representative of and the successor in interest to said deceased party and

now voluntarily comes into Court petitioning to be admitted as a party to this action and substituted as the defendant therein;

On consideration whereof, it is now here ordered and adjudged by the Court that said Emma A. Wismer be and she is hereby substituted as the defendant in the above-entitled action in the place and stead of the above-named defendant, George F. Wismer, now deceased.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Substituting Emma A. Wismer as Defendant. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [44]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased.

Defendant.

**Notice of Filing of Plaintiff's Proposed Bill of
Exceptions.**

To the Above-named Defendant and to Francis A.
Garrecht, Your Attorney:

You and each of you are hereby notified that on the
20th day of August, 1915, plaintiff filed in the office of

the clerk of the above-entitled court its proposed Bill of Exceptions in said cause, for use upon writ of Error of said cause to the United States Circuit Court of Appeals, a copy of which proposed Bill of Exceptions is herewith served upon you.

EDWARD J. CANNON,
CHARLES DONNELLY,

Attorneys for Plaintiff.

Service of within proposed Bill of Exceptions is hereby admitted this 20th day of August, 1915. Defendant hereby certifies that said Bill of Exceptions is true and correct, and hereby agrees that the Court may certify the same without further notice.

FRANCIS A. GARRECHT,
Attorney for Defendant. [45]

[Bill of Exceptions.]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE F. WISMER,

Defendant.

Messrs. CANNON & FERRIS, Appearing for
Plaintiff.

Mr. F. A. GARRECHT, Appearing for Defendant.

BE IT REMEMBERED, That heretofore, to wit,

on the 24th day of June, A. D. 1915, that before the Honorable Frank H. Rudkin, presiding as Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, this cause came on for hearing on the pleadings heretofore filed herein.

And thereupon, the following evidence was introduced and the following proceedings had: [46]

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Mr. CANNON.—This is the case of the Northern Pacific Railway Company vs. George F. Wismer, and is a companion case to that of Northern Pacific Railway Company vs. Mitchell, which was decided by your Honor, and appears in 208 Federal Reporter, on page 469, the Government desiring to appeal and having on that occasion allowed the time to expire in which the appeal might be perfected.

This case is No. 2195, and the following facts are stipulated:

Stipulation [of Facts].

It is stipulated and agreed that the following facts may be deemed to have been established:

That the plaintiff is a corporation, organized under the laws of the State of Wisconsin, and has duly complied with the laws of, and is authorized to do business in, the State of Washington, and is the successor in interest of the Northern Pacific Railroad Company.

That by Act of Congress of July 2, 1864, (13 Stats. p. 365), incorporating the Northern Pacific Railroad Company, there was granted to said company, its successors and assigns, for the purpose of aiding in the construction of its railroad and telegraph lines to the Pacific Coast, and to secure safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty (20) alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten (10) alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and [48] wherever on the line thereof, the United States has full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

That on October 4, 1880, the Northern Pacific Railroad Company definitely located that portion of its line of road from Spokane Falls to Wallula, opposite the lands in controversy, and filed a plat thereof in the office of the Commissioner of the General Land Office.

That on November 13, 1880, the Commissioner of the General Land Office withdrew from the public domain all odd numbered sections within forty (40) miles of said line so definitely located, and trans-

mitted his withdrawal order to the local land office at Colfax, Washington, which order was received and filed in said local land office November 30th, 1880; Colfax, Washington, then being the local land office at which the public lands of the United States surrounding the lands in controversy were subject to entry.

That thereafter, the Northern Pacific Railroad Company duly constructed its road on the line so definitely located, and that portion of its road opposite the lands in controversy, to wit, from Eight Mile Prairie to Wallula, was examined by Commissioners appointed by the President of the United States for that purpose, whose report was approved and said constructed road accepted by the President of the United States.

That the lands along said line of railroad were surveyed during the year 1887 and thereafter the railroad company used and dealt with the lands within said grant, except the odd [49] sections claimed by it in the Spokane Indian Reservation, which said odd sections were occupied by the Indians the same as other lands in said Reservation.

That on July 2, 1864 and on October 4, 1880, the South half ($S\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Thirteen (13), Township Twenty-eight (28) North, of Range Thirty-nine (39) East, in the County of Stevens, in the State of Washington, was non-mineral land within the place limits of the land grant to the Northern Pacific Railroad Company, being less than forty miles from its line.

That on the 1st day of September, 1910, at nine A. M. an agent of the Northern Pacific Railway Com-

pany appeared in the land office at Spokane, Washington, and notified the officers and the public of its claim to certain lands, by posting therein a copy marked "Plaintiff's Exhibit 1" and reading said notice, which was as follows:

"Plaintiff's Exhibit 1"—Affidavit of Publication.

State of Washington,
County of Spokane,—ss.

I, Thomas Hooker, do solemnly swear that I am the Business Manager of the SPOKANE CHRONICLE, a daily newspaper of general circulation published once each day at the City of Spokane, State of Washington, that the notice attached hereto and which is a part of the proof of publication, was published in said newspaper for 7 times, the publication having been made from the 25th day of August, A. D. 1910, to the 1st day of September, A. D. 1910. That said Notice was published in the [50] regular and entire issue of every number of the paper during the period of time of publication, and that the notice was published in the newspaper proper and not in a supplement.

THOMAS HOOKER.

Subscribed and sworn before me at the City of Spokane, on this 7th day of September, A. D. 1910.

[Notary's Seal]

G. W. ROCHE,

Notary Public Residing at Spokane, Washington.

To the Register and Receiver, United States Land Office, Spokane, Wash., and to All Persons Making Entry of Lands in the Former Spokane Indian Reservation:

You are hereby notified that the Northern Pacific

Railway Company claims title under the Act of Congress of July 2, 1864 (13 Stats. 365), to all portions of odd-numbered sections within the limits of the former Spokane Indian reservation, which the land officers of the United States have assumed open to entry September 1, 1910; said company is now asserting that claim before the Secretary of the Interior and will prosecute its rights before the courts if necessary.

Dated St. Paul, Minn., August 13, 1910.

NORTHERN PACIFIC RAILWAY CO.

By THOMAS COOPER,

Land Commissioner."

That the Commissioner of the General Land Office, in issuing instructions to the Register and Receiver of the United States Land Office at Spokane, relative to the entries to be made under the proclamation opening up the lands of the [51] Spokane Reservation, advised them as follows:

"The Northern Pacific Railroad Company is asserting a right under its grant to the lands in the odd numbered sections, and its claim has been denied by this office, and on appeal to the Secretary, but might possibly result in future litigation in the Court, and it would be well for you to call this fact to the attention of persons who apply to make entry."

and said facts were so called to their attention.

That prior to August 16, 1877, bands of Indians roved about and upon said lands and used the said country for hunting and fishing and so occupied the same as they did a considerable scope of country in-

cluding the unoccupied and unsurveyed territory now comprising Eastern Washington; that said Indians had not ceded any right or interest in and to any part thereof, if they had, to the Government of the United States.

That in June, 1877, certain Indian bands and tribes of the northwest country had commenced hostilities against, and were engaged in killing, wounding and outraging white settlers and destroying their property, and that during said time and for five or six years thereafter, said Indians continued to menace the white population living in Eastern Washington, Oregon and Northern Idaho, and the military forces of the United States Government and said hostile Indians were engaged in actual warfare.

That the said Indians so engaged in war with the United States during said time sought to induce other Indians at peace with the Government to engage in hostilities with them.

That among the peaceful Indians, which those at war [52] were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian Reservation, which Reservation includes the lands in the complaint.

That upon August 16th, 17th and 18th, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and there an Indian Inspector representing the Department of the Interior, acting in his official capacity; General Frank Wheaton and Captain M. C. Wilkinson, of the United States Army, representing the War Department.

That for the purpose of collecting the said Indians belonging to the said tribe on a reservation, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of any of the said Indians to all other lands not within the said reservation, and as a means of influencing said Indians to continue in friendly relations with the whites, to remain at peace with the Government of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder, the agreement, as set forth in exhibit "A" attached to the defendant's answer, was made, which is as follows:

[Defendant's Exhibit "A"—Indian Agreement in Council.]

IN COUNCIL AT SPOKANE FALLS, W. T.

August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, [53] thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning,

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of

the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:	Names:
E. C. WATKINS, U. S. Indian Inspector.	his
	Whistle-poo-sum X Spokane
	mark
	his
Quis-e-me-ow	X Spokane
	mark
	his
	Ah-mi-melechin X Spokane
Cos-to-akan	mark
	his
	X Spokane
	mark
FRANK WHEATON, Bt. Major Gen. U. S. Army, Col. 2nd Infantry,	his
	Ora-pa-han X Spokane
	mark
	his
M. C. WILKINSON, Bvt. Capt. U. S. Army, Aide de Camp.	Paul
	X Ora-pa-ham
	mark

That thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector, as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said Reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said [54] agreement and claimed the same as their reservation continuously thereafter until the year 1910.

That the action of the said E. C. Watkins in locating said Indians upon said reservation was by him

reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23d, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed.

That about August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by the said Indians as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council, and preserving peace between the Indians and white settlers, Brigadier-General Howard, of the Department of the Columbia, made an order, which is as set forth in exhibit "B" attached to defendant's answer, which reads as follows:

[Defendant's Exhibit "B"—Order Directing Protection of Certain Territory Against Settlement by Others Than Indians.]

HEADQUARTERS DEPARTMENT OF THE
COLUMBIA.

In Field, Spokane Falls, W. T.

September 3, 1880.

SPECIAL FIELD ORDERS.

No. 8.

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane [55] Indians, the following described territory, to wit: Commencing at

the mouth of the Cham-a-kane Creek, thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville and Camp Chelan, are charged with the proper execution of this order.

By command of Brigadier-General Howard,

H. H. PIERCE,

1st Lieutenant, 21st Infantry,

Acting Aide-de-Camp.

Official:

H. H. PIERCE,

Acting Aide-de-camp.

That the lands described in exhibit "A" attached to defendant's answer, which include the premises described in the complaint, are embraced within the limits described in the proclamation of the President of the United States, which was, and is, as set forth in exhibit "C" attached to defendant's [56] answer, which reads as follows:

[Defendant's Exhibit "C"—Executive Order Setting Aside and Reserving Certain Lands for Spokane Indians.]

Executive Mansion, January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane river westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence east along said parallel to the place of beginning.

R. B. HAYES.

That on or about April 2, 1910, at the United States Land Office, in the city of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint under the Act of Congress approved May 29, 1908 (35 State L. 458), and the proclamation of the order of the President of the United States of May 22, 1909, which entry [57] was duly accepted by the Register and Receiver of said Land Office.

That on April 9, 1913, patent to said land was issued to this defendant, and in virtue of his said entry and the patent thereafter issued to him, defendant

entered into the possession of said premises on or about April 2, 1910, and ever since has continued to and now does occupy the same.

That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L. 365); but said claim was denied and on appeal decided by the Secretary of the Interior in the words and figures as set out in exhibit "D" attached to defendant's answer, which reads as follows:

[Defendant's Exhibit "D"—Decision of Secretary of Interior.]

DEPARTMENT OF THE INTERIOR.

926

WASHINGTON.

G. B. G.

Mar. 7, 1910.

Commissioner of the General Land Office.

Sir: This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said Company to 64,000 acres of land, falling within the place limits of the grant made to said Company by the Act of July 2, 1864 (13 Stat., 365), because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 [58] (35 Stat., 458).

It appears from your said office decision and it is not disputed that in August, 1877, E. C. Watkins, an Indian Inspector of this Department had a conference with the Spokane Indians and set apart or prom-

ised to have set apart for their use a certain tract of land; that on November 26, 1877, said Inspector made a report to the Commissioner of Indian affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said report he refers to the Colville Indian Reservation, in which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians north of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Sims, United States Indian Agent, Colville Agency, Washington, shows that the Spokane Indians numbering 685, "are living along the Spokane River and vicinity from Spokane Falls to its junction with the Columbia," these being the same lands set apart for them by Inspector Watkins; and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant 21st Infantry, by command of Brigadier General Howard, proclaimed in special field order No. 8, Headquarters Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians described the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against [59] settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace

until the pledge of the Government should be fulfilled or other arrangements accomplished. The executive order setting apart said Indian Reservation is dated January 18, 1881, and describes the lands practically the same as in said order No. 8.

The definite location of the Northern Pacific Railway's line of road coterminous with and opposite the lands in question, was made October 4, 1880. It thus appears that the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation created by the said H. H. Pierce, September 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation January 18, 1881.

Your office decision holds that the negotiations of the said E. C. Watkins, the facts stated in said report of John A. Sims, United States Indian Agent and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal, except the case of *Buttz v. Northern Pacific Railway Company*, 119 U. S. 55, which, it is contended is authority for the contention of the Company that these lands had not been withdrawn prior to January 18, 1881, and that they were therefore subject to the Company's grant October 4, 1880. The case cited is not in point and furnishes no authority for the contention made. [60]

The fact of the negotiations and of the military

order above referred to is not denied upon the appeal, but the legal effect of these proceedings is disputed.

Upon a careful consideration of the subject, it is believed that these proceedings constitute such reservation of the land in question as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed and your office will proceed to the disposition of these lands in accordance with the provisions of the Act of May 29, 1908, *supra*.

Very respectfully,

Sgd. FRANK PIERCE,

First Assistant Secretary.

Mr. CANNON.—In view of the facts that we have stipulated, the only exhibit that the railway company will offer is Exhibit Number One. The other notices published are the same as this one.

The Notice referred to was marked "Plaintiff's Exhibit 1," and is incorporated in the preceding stipulation.

Mr. CANNON.—I stipulated yesterday that Chief James Bernard, if present in court would testify as set forth in this stipulation.

Mr. GARRECHT.—Well, there are four of them.

Mr. CANNON.—Yes. That said witnessess will testify [61] in relation thereto as follows:

It is admitted that CHIEF JAMES BERNARD, a witness for defendant, now in attendance upon the court would testify upon his oath:

That he is well acquainted with the Spokane Reservation and vicinity since before 1877; that the creek which flows into the Columbia River from the

east side, at a point near Cedonia and about ten miles north of said Reservation, was known among the Indians in 1877 as Nimchin Creek, and its approximate location is indicated on the map, Defendant's Exhibit "E," by the point of the arrow thereon, marked (1).

It is also admitted that CHARLEY ORAPAHAN, a witness for defendant and now in attendance upon the Court, would testify upon his oath:

That he is a son of Chief Orapahan and a nephew of Paul Orapahan, who was a Sub-Chief or Headman of a band of Indians of the Lower Spokane Tribe, and that said CHARLEY ORAPAHAN will testify to the same effect as Chief James Bernard with reference to Nimchin Creek.

It is further admitted that JOHN HILL, a witness for defendant and now in attendance upon the Court, would testify upon his oath that he has resided on the lands included in the Spokane Reservation since 1876 and has been well acquainted with said reservation and vicinity since said time.

It is also admitted that CHARLES HAINES, a witness for defendant and now in attendance upon the Court, would testify upon his oath: [62]

That he lived on what is known as the "Haines Place" on a part of Walker's Prairie, from 1862 until 1900, and at another point on Walker's Prairie since 1900, and that he was well acquainted with the Spokane Reservation and vicinity during all of said times.

It is admitted that all of said witnesses would testify upon oath:

That CHIEF ORAPAHAN, his son CHARLEY

ORAPAHAN, PAUL ORAPAHAN, and other Indians of their band, prior to the month of June, 1879, occupied a portion of said Reservation designated on the map, Defendant's Exhibit "E," by the point of the arrow marked (2); and had small farms there.

That there was a flat of five or six hundred acres on said reservation upon which in 1879 there were a few small Indian farms or gardens at about the place indicated on the map, Defendant's Exhibit "E," by the point of arrow (3).

That each of said witnesses will testify that he was well acquainted with Chief Ahmamelican, and that said chief and his band at said times had about two or three hundred acres of land enclosed on said reservation at about the point indicated on the map, Defendant's Exhibit "E," by the arrow marked (4);

That each of said witnesses will testify that he was well acquainted with Chief Whistlepoosom; that said Chief was also known at Lot, and in the forepart of the year 1879, with his band, occupied and had farms on about eight hundred acres of land on the Spokane Reservation in the vicinity of the place designated on the map, Defendant's Exhibit "E" at the point of the arrow marked (5); [63]

That each of said witnesses will testify that in the month of July, 1879, and for a long time prior thereto, the Haines place at Walker's Prairie was at about the point designated on the map, Defendant's Exhibit "E," at the point of the arrow marked (6);

That the said witnesses, CHIEF JAMES BERNARD, JOHN HILL and CHARLES HAINES, were each well acquainted with James O'Neil, who

was Indian Farmer for the Government in 1879.

That each of said witnesses, CHIEF JAMES BERNARD, CHARLEY ORAPAHAN, JOHN HILL and CHARLES HAINES, will further testify on oath that in 1879 said chiefs and bands residing upon and occupying said lands as aforesaid, together with other Indians were claiming as their reservation the territory embraced in the following description:

Beginning at the source of the Chimokane Creek, in Washington Territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

Mr. CANNON.—It may be stipulated that the Spokane Indian Reservation Map may be introduced in evidence as part of the defendant's case, and that the markings thereon placed are correct.

Said map was marked "Defendant's Exhibit E" and is hereto attached.

Mr. CANNON.—I think that is all we have got, isn't it?

Mr. GARRECHT.—I have some exhibits. [64]

Mr. GARRECHT.—I offer in evidence report of Commissioner of Indian Affairs for the year 1878, and particularly the following excerpt from page 58, the land division.

Mr. CANNON.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—I think that will be a question of law. The objection is overruled.

Plaintiff excepts and exception allowed. Said report is marked Defendant's Exhibit "F."

Said excerpt is as follows:

**[Defendant's Exhibit "F"—Excerpt from Report of
Commissioner of Indian Affairs.]**

THE LAND DIVISION.

This division has charge of all the Indian lands in the United States and is the law division of the office.

LANDS.

Indian Reservations are created and their boundaries defined in four different modes:

First. By treaties, conventions and agreements with the various tribes;

Second. By Acts of Congress;

Third. By Executive Orders;

Fourth. By order of the Secretary of the Interior.

Mr. GARRECHT.—I offer in evidence a certified copy of a letter of May 7th, 1877, from the Indian Commissioner to Colonel E. C. Watkins, U. S. Indian Inspector, San Francisco, California. [65]

The COURT.—That is the letter under which he was acting?

Mr. GARRECHT.—The letter under which he was acting; and particularly the following excerpts:

Mr. CANNON.—I make the same objection to that; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said letter was marked "Defendant's Exhibit G."

[**Excerpt from Letter, dated May 7, 1877, from
Indian Commissioner to Indian Inspector.**]

The excerpt therefrom, reads as follows:

Sir:

Upon completing the duty assigned you in California, you are hereby directed to proceed to inspect the Nez Perce Agency in Idaho. * * *

From the Nez Perce Agency you will proceed upon a tour of inspection, which shall include the remaining agencies in Idaho, and all the agencies in Washington Territory and Oregon, visiting the agencies in such order as you shall deem most advantageous and most economical of time and expense. * * *

Scattered through the state and territories to be visited—especially on the Columbia River and in the Northern part of Idaho—are various bands of roving Indians whose uncontrolled presence in a country fast settling up is a source of annoyance and danger. Your special attention will be given to the subject of gathering these Indians upon permanent reservations. * * *

Such Indians should be made distinctly to understand [66] that their absence from their reservations as vagabonds will no longer be permitted by the Government, and such an understanding should be established between yourself, the respective agents and General Howard as will ensure the fulfillment of the demands made upon the Indians.

Mr. GARRECHT.—Then I offer a certified copy of the record of the council that was held with those Indians, August 16th, 17th and 18th, 1877, and particularly the following excerpts:

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said paper was marked Defendant's Exhibit "H."

[Defendant's Exhibit "H"—Excerpts from Record of Council Held With Indians on August 16-18, 1877.]

Said excerpts read as follows:

Col. Watkins: Have come to meet you from Washington, but by reason of the outbreak of the Non-treaty Nez Perces have not heretofore been able to do so.

General Wheaton commanding the troops and Captain Wilkinson of the staff of General Howard will represent General Howard and the Army. We want to find out the feeling of the Indians here towards the whites. Some Indians have been roaming over the country. The policy of the Government is to place Indians on reservations. * * *

I will say a few words. I visit all the Indians [67] in the United States, give them advice, find out what they want, make recommendations, come as their friend to tell them what is best for them. I am not here to work for white men. The commissioner of Indian Affairs, Sec'ty of the Interior, President of the United States, have all decided that it is best for all Indians to go upon reservations. The President of the United States gives the Indians more land than he does the white man. White men can take up and hold 160 acres of land, but the Indians can have much more. The reserve proposed for the

Spokanes gives to each Indian more land. (Describes the proposed new reserve.) If I did not think it was a good reserve in every particular, I would not urge it upon you. * * *

I will add that if you will locate upon reservations, you will receive implements &c. after I find out where you will go. I will tell you what I will get for you.

Whistle-poosam: I am willing to go where you want me.

Ora-pa-han: I am well pleased about this Council. I like roots but I like what the ploughs bring. I am pleased with the country you have given us and my heart is laughing; that the reason why I'm talking. That's what I tell my people to take the ploughs, but the white people tell them they can't have the country and so they stop. Now I have a good many Children listening to you today, now I can tell them to take [68] the plough & go to work, now my people can build houses, split rails and have homes. I can stay by my old graves and be buried there.

Col. Watkins: Explains again fully the wishes of the government in regard to Indians either going upon reservations in order to secure homes upon them, or becoming Citizens, no matter only so they get homes, and stop roaming. * * *

Col. Watkins: Glad to hear what has been said and hope you and your people are satisfied with your reservation.

Ans. Am well pleased with our reservation. When you put our Indians on the reservation want

soldiers to watch between them and the whites.

Col. Watkins: Again explain at length what it means to become a Citizen, the absolute necessity for Indians to get title to land they occupy or go upon reservation and the impossibility of giving them *all* the Country, that as it is they have more than the allowance to a white man (160 acres) and that some of the Indians must move as they can't all be included in the lines of the reservations.

Kin-kin-no-wah Colville: I want you to build a Post (Military) to look after the whites and the Indians. I want the whites away from me.

Captain Wilkinson spoke of the relative control of the War and Interior Departments.

Ah-mi Melican, Lower Spokane: This is not the first time the whites have talked to me as you have. I believe what you all have said. [69] I want to get farms.

Cos-te-Akan: I think it best for me to go on the reservation. I will study and see. Will you buy my farm?

Gen. Wheaton: No government officer moves without his orders; he will be kind and thoughtful to all who obey his law, and his hand will be heavy upon those who do not. The officers all hope that the instructions of Col. Watkins will be obeyed. Do as you have been instructed by the Inspector and all will be well.

Excerpts from Report of Col. Watkins, Dated Lewiston, Idaho, August 23, 1877.

General Howard thought it would be well to send a force of troops through the country—with an ob-

jective point beyond—nominally, to co-operate with the columns following the hostiles, in the direction of Montana,—*really*, by a show of military strength, to produce a moral effect on the Indians,—restore confidence to the citizens, and co-operate with the Indian management, in the interest of peace.

I fully concurred in the advisability of this movement, and I think the result has been very beneficial. Gen. F. Wheaton, was placed in command of the column, with instructions to march via the Spokane River, and Coeur d'Alene mission,—with Missoula, Montana, as the objective point:—to co-operate with myself,—as the representative of the Indian office,—in preventing hostilities, &c., among these Northern tribes. Capt. Wilkinson of his, Gen. Howard's staff, was directed to accompany the column, and also co-operate with me. * * *

But after much talk, and full description of the country, [70] given by White men, and Indians familiar with it, I decided to recommend that a piece of land lying north of the Spokane, near its mouth,—about twenty miles square, be set apart for the Spokane Palouse, and other roaming Indians of the vicinity.

The description is as follows:

Beginning at the mouth of the Nomchin Creek, thence easterly to the source of the Chamokane Creek, thence down to Chamokane to the Spokane river, thence down the Spokane river to the Columbia, thence up the Columbia to the place of beginning.

There are no white settlers living on this tract,

and it is a central point for the Indians—proposed to be placed on it,—adjacent to the present Colville reserve and forming the proposed addition,—and a suitable place for a permanent Indian reserve. It has natural boundaries,—is not large,—but has a fair proportion of arable land—enough to furnish a farm to every Indian—and is entirely satisfactory to the Lower Spokanes, and many of the Upper band—and the Palouse Indians.

All these gave me their written promise to remove to this location by the 1st of November next. (I enclose the agreement with this report.)

This covers all the roving Indians below the Spokane, and includes the greater portion of the Spokane Tribe. * * *

I also wish to express my objection to Gen. Wheaton, and the officers of his command, for their hearty co-operation, and the many courtesies extended to me personally.

Capt. Wilkinson of General Howard's staff, was with me [71] during the entire trip, working with energy and ability to secure the end desired, and accomplished. He is keeping a full record for the information of Gen. Howard, and will accompany me to other reservations. I file herewith, record of the proceedings in council, as taken in abbreviated and condensed form by Capt. Wilkinson. * * *

I also enclose agreements signed by the Indians.
* * *

Recapitulation of Recommendations.

3d. That the following described tract be set

apart for the use of the Spokane Indians, and Palouse band.

Beginning at the mouth of the Nomchin Creek, thence easterly to the source or head waters of the Chamocum Creek, thence down the Chanocum to the Spokane River, thence down the Spokane to the Columbia, thence up the Columbia to the place of beginning.

Mr. GARRECHT.—I offer a certified copy of a letter dated Spokane Falls, Washington Territory, August 18th, 1877, from E. C. Watkins, Inspector, addressed to General O. O. Howard, commanding department. The papers hereto attached are excerpts.

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said paper was marked "Defendant's Exhibit I."

**[Defendant's Exhibit "I"—Excerpt from Letter,
Dated August 18, 1877, from Inspector Watkins
to General Howard.]**

Said excerpt is as follows:

Dear General:

We have just closed our council with the Indians
[72] of the various tribes of the North. * * *

The Indians present all expressed their friendly feeling towards the whites and promised to go upon the reservation I have decided to recommend and upon those already established. I send you a copy of the agreement signed by the Indians. A good feeling prevails and the Indians promised obedience.

(Attached to this letter are four distinct agreements with Indians. One with the Colville, Okanogan and Lake Bands; with the Colville band of Pend O'Reille; with the Palouse tribe and one with the Spokane Tribe, which last is identical with exhibit "A" attached to complaint.)

Mr. GARRECHT.—Next a certified copy of a letter dated August 18th, 1877, from Col. Frank Wheaton to General Howard, and particularly the following excerpts:

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed. Said letter was marked "Defendant's Exhibit J."

[Defendant's Exhibit "J"—Excerpts from Letter Dated August 18, 1877, from Col. Wheaton to General Horace.]

The excerpts from said letter read as follows:
General:

* * * This command arrived here on the 10th instant, the day designated by Indian Inspector Watkins for the assembling of the chiefs and headman of the various tribes located in this region
* * * Colonel Watkins and your aide, Captain Wilkinson, came with me to this point. * * *
Inspector [73] Watkins found it impossible to assemble the council of Chiefs until the 16th, this delay was necessary and advantageous as affording the best disposed Indians of influence an opportunity to bring disaffected Indians, particularly of the Spokane tribe, to more correct understanding of

the Government's requirements. I think they all understand now that all Indians in your department will be compelled to elect either to become citizens of the United States or go upon distinct reservations. * * *

The Coeur d'Alenes, Colvilles, Okanogans, Pend O'Reilles, Lower Spokanes, Kalispells and the small band of Palouse seem to be satisfactorily located, and I doubt if through any act of theirs any trouble will be made in your Department—as settlements increase near the reservations for the above-named Indians conflicts with citizens must be expected.

Mr. GARRECHT.—Next, a certified copy of a telegram from Wilkinson, Aide, dated August 23d, 1877.

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed. Said telegram was marked "Defendant's Exhibit K," and is as follows:

[Defendant's Exhibit "K"—Telegram Dated August 23, 1877, from Wilkinson to Captain Sladen.]

To Captain Sladen, Aide-de-Camp,
Headquarters, Portland, Oregon.

Just returned from Spokane Falls. Wheaton's Column due here Monday—Council with Northern Indians successful. [74] Inspector Watkins has written agreements with Chiefs to go on reservations. Kind feelings expressed by Indians. Send

communications to me to Dalles.

Wilkinson, Aide.

Mr. GARRECHT.—Next is a certified copy of the Report of Indian Inspector Watkins, dated at Washington, D. C., November 26th, 1877.

The COURT.—That is the same report that was offered before, is it not?

Mr. GARRECHT.—Yes, your Honor; but I wanted particularly the letter thereto attached, dated December 29, 1877, signed by E. A. Hayt, Commissioner, showing general approval of the report by the Commissioner.

Mr. CANNON.—I will make the same objection; incompetent, irrelevant and immaterial.

The COURT.—Same ruling.

Plaintiff excepts and exception allowed. Said report was marked "Defendant's Exhibit L."

**[Exhibit "L"—Letter, Dated December 29, 1877,
Commissioner to Secretary of Interior.]**

The letter referred to is as follows:

DEPARTMENT OF THE INTERIOR.

OFFICE OF INDIAN AFFAIRS.

Washington, Dec. 29, 1877.

The Honorable, The Secretary of the Interior,

Sir: I have the honor to submit herewith a report by Inspector E. C. Watkins on the consolidation of the Indians [75] of Oregon and Washington Territory, together with letters of G. A. Henry, Special Indian Agent. I concur in the recommendations of the Inspector, but think his estimate of the expense of such consolidation is entirely too high. I

would like to see the proposed plan adopted, with the least delay possible.

Very respectfully your obd't servant,

E. A. HAYT,

Commissioner.

Mr. GARRECHT.—I offer a certified copy of a letter of September 1st, 1880, from the War Department to the Secretary of the Interior, enclosing a telegram of General Howard; telegram dated August 21, 1880; and certified copy of a letter of O. O. Howard, Brigadier General, to Colonel Frank Wheaton, Fort Coeur d'Alene, dated September 5th, 1880, which enclosed a copy of Field Order No. 8; also a certified copy of a letter from Secretary of War to the Secretary of the Interior dated January 15th, 1881, enclosing a requested description of the Howard map.

Said paper was marked "Defendant's Exhibit M."

Mr. CANNON.—I make the same objection; incompetent, irrelevant and immaterial.

The COURT.—The same ruling.

Plaintiff excepts and exception allowed

Said letters and excerpts read as follows: [76]

[Defendant's Exhibit "M" — Letter, Dated September 1, 1880, from War Department to Secretary of Interior, etc.]

WAR DEPARTMENT.

Washington City.

September 1st, 1880.

Sir: I have the honor to invite your attention to the enclosed copy of a dispatch from the Commanding General Department of the Columbia, dated the

31st ultimo, representing that white settlements are beginning on unsurveyed land claimed by Spokane Indians between Chamakine Creek and the Columbia River, and requesting that authority be obtained to declare a straight eight miles broad temporarily withdrawn from settlement, at least until surveyed.

Very respectfully,

H. T. CROSBY,

Chief Clerk,

For the Secretary of War, in his absence.

To Honorable, The Secretary of the Interior. [77]

(Enclosure)

THE WESTERN UNION TELEGRAPH COMPANY.

Dated Spokane Falls, W. T., August 31, 1880.

Received at Cor. 15th & "F" Streets, Washington,
D. C., 1:56 P. M.

To: Adj. Genl. U. S. Army, Washn, D. C.

White settlements are beginning on unsurveyed land claimed by Spokane Indians between Chamakine Creek and the Columbia along the Spokane River please get me authority from the President or Secy of Interior to declare a straight eight miles broad temporarily withdrawn from settlement at least until surveyed I ask this on military grounds to prevent outbreak and complications as the Indians will take homesteads if time and protection are given answer desired tomorrow if possible.

HOWARD,

Comdg. Dept. [78]

Sir: Enclosed please find an order relating to a small reservation which Col. E. C. Watkins

promised to certain Spokane Indians. The order explains itself. I have visited the several bands of Spokanes, first those of Deep Creek, where they are taking land in severalty;—Second, on the said Watkins' reservation * * * off the said reservation, I regard it important that surveys be speedily made and that all possible Indians be aided by encouragement and advice to take up lands as white men under the Indian homestead law. Others should be free to go on the Watkins reservation, or any other as they may elect. * * *

What we wish particularly is, that measures should tend toward an ultimate peaceable solution of all questions that affect these Indians. The Secretary of the Interior has asked our co-operation and expressed himself as grateful for promised aid.
[79]

(Enclosure)

MILITARY ORDER

Headq'rs. Dept. of the Columbia,

In the Field, Spokane Falls, W. T.

September 3, 1880.

(FIELD ORDER NO. 8)

WHEREAS, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit:

Commencing at the mouth of Cham-a-kane creek, thence north eight miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane rivers to the point of

beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier General Howard,

H. H. PIERCE,

Official.

1st Lieut., 21st Infantry,

Acting Aid-de-Camp. [80]

January 15, '81.

Sir: I have the honor to acknowledge the receipt of your letter dated the 7th of September, last, enclosing one from the Commissioner of Indian Affairs, in reply to letter from this Department transmitting copy of a telegram from General Howard, dated Spokane Falls, W. T., August 31st, last, in which he states that "White settlements are beginning on unsurveyed lands claimed by Spokane Indians between Chamakine Creek and the Columbia along Spokane River, and asking authority from the President to declare a *straight* eight miles broad temporarily withdrawn from settlement.

In reply to your request that General Howard be

instructed to forward a description by natural objects of the tract of country which he desires reserved for the protection of said Indians, I beg to enclose herewith a description and plat of the lands referred to.

Very respectfully,

Your obedient servant,

ALEX. RAMSEY,

Secretary of War.

The Honorable, The Secretary of the Interior. [81]

Mr. GARRECHT.—I offer from the record of the Senate, January 14, 1878, page 304, Volume 7, Part 1, XXXXV Congress, Second Session, particularly the part of the resolution submitted by Senator Mitchell, reading as follows:

[Defendant's Exhibit "N"—Senate Record, etc.]

“Resolved further, That a copy of these resolutions be transmitted to the Secretary of the Interior with the request that he communicate to the Senate, such recommendations referring to the general proposition of consolidation of Indian Agencies in the form herein suggested, together with any report of Indian Inspectors or other officers of the Indian Department.”

Mr. CANNON.—I make the same objection. Incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Plaintiff excepts and exception allowed.

Mr. GARRECHT.—And from the same volume at page 327, another resolution by Senator Mitchell, and particularly this excerpt:

“RESOLVED, That the Secretary of the Interior be directed to transmit to the Senate a copy of the report of the Indian Inspector Watkins.”

And from page 514 of the same volume, the following executive communication:

“The Vice-President laid before the Senate a communication from the Secretary of the Interior, transmitting in compliance with the resolution of the Senate, of the 15th inst., a copy of the report of Indian Inspector E. C. Watkins, [83] dated November 26th, 1877.”

Mr. CANNON.—These are objected to on the same grounds.

The COURT.—They are going in just for the convenience of the Court. It is a public document of which the Court would take judicial notice in any event.

Plaintiff excepts and exception allowed.

Mr. GARRECHT.—And then Senate Executive Document Number 20, XXXXV Congress, Second Session, which purports to have been printed as the result of the resolutions referred to; particularly directing attention to the following excerpt:

“The Spokanes and Palouse, I located north of the mouth of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. Both of these tracts are described in my report of the conference held with those Indians, and both were recommended to be set apart for their use.”

And also the letter in printed form of E. A. Hayt, Commissioner, on page 8, approving the report.

Said Senate Record was marked “Defendant’s Exhibit N.”

Mr. GARRECHT.—I will offer in evidence an official publication of Executive Orders relating to Indian Reserves from May 14, 1855 to July 1st, 1902, particularly page 134, relating to the Spokane Reserve, and the Executive Order right under it. I want both of those.

Mr. CANNON.—I make the same objection. [84]

The COURT.—Same ruling.

Plaintiff excepts and exception allowed. Said Book was marked “Defendant’s Exhibit O.”

**[Defendant's Exhibit "O" — Order Directing
Protection of Certain Territory Against
Settlement by Other Than Indians, etc.]**

The items offered read as follows :

SPOKANE RESERVE.

(Special Field Orders No. 8)

Headquarters, Department of the Columbia

In the Field, Spokane Falls, Wash.,

September 3rd, 1880.

Whereas in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of Cham-a-kane Creek, thence north 8 miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits. It is hereby directed that the above-described territory, being still unsurveyed, be protected against settlement by other than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution [85] of this order.

By command of Brigadier-General Howard.

H. H. PIERCE,
First Lieutenant, Twenty-first Infantry, Acting
Aide-de-Camp.

Executive Mansion, January 18, 1881.

It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: Commencing at a point where Chemekane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly, along the southern bank thereof, to a point where it enters the Columbia river; thence across the Columbia, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

R. B. HAYES.

Mr. GARRECHT.—I want to call attention to certain statutes in the record relating to Spokane Indian Reservation, Volume 32, at pages 266, 575, 742, 744; Volume 33, page 1006; Volume 34, pages 377, 654; Volume 35, pages 19, 458, 813; Volume 36, page 2495. Also to the first Kappler [86] Indian Affairs, Laws and Treaties, pages 754, 799, 924 and 925.

Mr. CANNON.—I object to that. I don't know what it is.

The COURT.—I don't either, but these are historical matters of which I suppose the Court would take judicial notice anyhow. They are a matter of con-

venience to the Court.

Mr. CANNON.—I don't care about objecting to the statutes, but I will preserve the objection because I don't know what it is.

Mr. GARRECHT.—I want to offer in evidence a deed from the United States of America, to Isabel Moses, an Indian allottee, to show the form of these deeds to an odd section of land. Part of my defense is that this was a political question governed entirely by the executive department. I wish to substitute a copy for the original in the record.

Mr. CANNON.—Then this is really for our enlightenment, I suppose. It doesn't involve the land in question but is merely a sample of the deed.

Mr. GARRECHT.—Yes, of certain odd sections in the reservation.

The COURT.—The form of deed given for land in that reservation.

Mr. GARRECHT.—Yes.

Mr. CANNON.—I make the same objection.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said Deed was marked "Defendant's [87] Exhibit P" and a copy thereof reads as follows:

[Defendant's Exhibit "P"—Allotment to Isabel Moses.]

**SUBSTITUTED FOR DEFENDANT'S EXHIBIT
"P"**

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of

allotments approved by the Secretary of the Interior July 28, 1909, whereby it appears that ISABEL MOSES, an Indian of the Spokane tribe or band has been allotted the following described land:

The North half of the northwest quarter and the northwest quarter of the northeast quarter of section thirteen in Township twenty-eight north of Range thirty-nine east of the Willamette Meridian, Washington, containing one hundred and twenty acres,

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Isabel Moses, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of [88] said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the TWENTY-FOURTH day of JANUARY, in the year of our Lord one thousand nine hundred and TEN, and of the Independence of the United States the one hundred and THIRTY-FOURTH.

By the President: WM. H. TAFT,

By M. W. YOUNG,

Secretary

H. W. SANFORD,

Recorder of the General Land Office [89]

Mr. GARRECHT.—I am going to offer in evidence the report of the Commissioner of Indian Affairs for 1879, page 143, and particularly the part indicated by pencil brackets on page 143.

Mr. CANNON.—That is subject to the same objection.

The COURT.—It will be admitted.

Plaintiff excepts and exception allowed. Said Report was marked "Defendant's Exhibit Q."

[Defendant's Exhibit "Q"—Excerpt from Report of Commissioner of Indian Affairs for 1879.]

The portion particularly offered reads as follows: Quil-lo-asket himself, with a stove-pipe hat and black overcoat with cape on, driving. From here we went to Pascal's, another good farm of about 80 acres, with log dwelling and barn and a good Eastern-made wagon. A few calves in a pen, around

which were some fine-looking cows that the Indians were milking.

From Pascal's to Charley's place. Charley has rather more land fenced in than Pascal, part of which is cultivated for wheat and garden, and the balance used for hay, of which he cuts three or four tons. Charley prides himself upon his vegetables. He showed me beans and two kinds of pease, small and marrowfat, of last year's raising. His irrigating ditch, after using for his land, he runs down to the bank of the Columbia, where it is used by Chinese miners in gold washing, for which they pay Charley \$5 per month. A short distance below Charley's house, on the bank of the river, with the help of only his own people, they have erected a neat little church (log) and a small cabin for the fathers' use when visiting them. [90]

After leaving Charley's place we intended going to *old* Charley's, but in some manner lost the trail and were compelled to camp that night in a low muddy place, and where there was but little feed for our animals. In the morning early left, and after a ride of five or six miles came to Ore-poken's one of the Spokanes. From his place we visited the farm of his son; then on over the hills some three or four miles to the trail leading down the mountain to the Spokane River. We here struck a most beautiful flat of 500 or 600 acres, in which there were two or three small Indian farms or gardens of only three or four acres each. From here up the Spokane the traveling was bad and dangerous. We had many streams to cross leading from the mountains to the

river, deep and rapid, and one very bad landslide to pass over. We were glad when we again commenced ascending the mountain—a long, steep, and sandy trail. From the summit, a ride of five or six miles, through a fine grazing and wheat-producing country of thousands of acres, with two or three permanent little streams running through it, brought us to the farm or farms of Ah-ma-melican, and a mile from there to Whistle-poo-sum's band and farms. At Ah-ma-melican camp there are between 200 and three hundred acres inclosed, with probably 150 acres cultivated, and Whistle-poo-sum has, I should judge, nearly 800 acres inclosed. Within the inclosure are the different farms, not to exceed, however, 200 acres in cultivation. The land was so wet and miry that it was impossible to give it a thorough investigation. But little was doing excepting the repairing of the fencing. They were soon in hopes of getting in their wheat. Whistle-poo-sum had no seed wheat. I told him to send [91] to the agency after some.

After leaving this place, a ride of about eight miles through the timber brought us to Haine's, at Walker's Prairie.

Mr. GARRECHT.—There is one thing where, through inadvertence, I made a mistake in Paragraph XIV of my answer, which I wish to correct by striking the words “H. H. Pierce, First Lieutenant of the Twenty-first Infantry of the United States Army, by Command of.” This order was issued by Brigadier-General Howard. It is just a formal matter. I have got it as if it was an order by the Lieutenant.

The COURT.—You may make the necessary amendment.

Mr. GARRECHT.—You have no objection to that?

Mr. CANNON.—Oh, no. I don't make any point on that at all.

Mr. GARRECHT.—I offer in evidence statistics which appear in the report of the Indian Commissioners for 1880, on pages 270 and 271; the statistics of the number of acres cultivated during the year by the Indians and so forth, which includes the Spokanes; those that I have checked with a little check mark, I would like to have put in the record.

The COURT.—They will be admitted for what they are worth.

The portion particularly offered reads as follows:

[Excerpt from Report of Indian Commissioners for 1880, etc.]

COLVILLE AGENCY.

Coeur d'Alene, Spokane, Colville, Lake, Calispel, O'Kinakane, San Poel, and Methow.

Number of acres cultivated during	
the year by Indians.....	3,400
Number of acres broken during the	
year by Indians.....	1,000

[92]

Bushels of Wheat.....	18,000
Bushels of Corn.....	500
Bushels of Oats and Barley.....	17,000
Bushels of Vegetables.....	4,150
Tons of Hay Cut.....	150
Feet of Lumber sawed.....	60,000
Cords of Wood cut.....	2,500

Rods of fencing made.....	2,000
Value of Robes and Furs sold.....	500
Horses	5,000
Mules	8
Cattle.....	2,500
Swine.....	250

Mr. GARRECHT.—I also offer from the report on Indian Affairs for 1881, from page 160, the following:

The following table is an exhibit of industries among the Spokanes, and the number of domestic animals owned by them:

Number of farmers.....	75
Number of squared log houses.....	8
Number of round log houses.....	58
Number of log barns.....	9
Number of log stables.....	43
Number of granaries and storehouses...	26
Number of acres of wheat planted	587
Number of acres of oats planted.....	294

[93]

Number of acres of corn planted.....	10
Number of acres of potatoes planted	23
Number of acres of turnips planted.....	4
Number of acres of onions planted.....	6
Number of acres of beans planted.....	3

They have large gardens of vegetables adapted to this climate, and melons and pumpkins in quantities.

Domestic Animals.

Number of horses.....	936
Number of milch cows.....	189
Number of oxen.....	45

Number of other cattle.....	130
Number of swine.....	—
Number of fowls.....	257
Number of tons of wild hay.....	296

It is stipulated and agreed by and between counsel for the respective parties hereto that the plaintiff's railroad was completed opposite the lands in question subsequent to the 1st day of June, 1881.

Which was all the evidence offered or received on the hearing of said cause. [94]

1) Approximate location of small creek known as Tomahawk in 1879

2) Place occupied by Chief Osheshe in 1879

3) Elevation 500 or 600 acres

4) Location of Chief Ah-mo-melican and his band in 1879

Location of Chief Ah-mo-melican and his band in 1879



miniature of
28 Septs Ex 6

COUNTY
SPOKANE

Whereupon and thereafter counsel for the respective parties submitted briefs and the Court took said case under advisement and thereafter filed its opinion herein in favor of defendant and against plaintiff; and thereafter and on the 24th day of July, 1915, judgment was entered in accordance with said opinion; and now in furtherance of justice and that right may be done the plaintiff presents the foregoing as its full Bill of Exceptions in this cause and prays the same may be settled and allowed and signed and certified as provided by law and the practice of this Honorable Court.

EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff. [96]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,

Defendant.

**Certificate and Order Allowing and Settling Bill of
Exceptions.**

This cause came on duly and regularly for hearing before the Court on the 20 day of August, 1915, upon application of the plaintiff for the settling and certifying of its proposed bill of exceptions lately filed

herein, and the said proposed bill of exceptions having been presented, served and filed within the time allowed by law, and the defendant having proposed no amendments to said bill of exceptions, and the time for serving or filing any proposed amendments to said bill of exceptions having expired,—

Now, Therefore, on motion of attorneys for plaintiff, it is ORDERED, that said proposed bill of exceptions heretofore filed by the plaintiff in this cause, is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all the evidence and proceedings taken and had upon the trial of said cause, and that the same as so settled and allowed be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, and that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects, and it is hereby approved, allowed and settled [97] and made a part of the record herein.

Done in open court this 20 day of August, 1915.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington. August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [98]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Assignments of Error.

Comes now the above-named plaintiff, Northern Pacific Railway Company, and makes and files the following Assignments of Error in said cause, which said plaintiff will rely upon in the United States Circuit Court of Appeals for the Ninth Judicial Circuit for relief from, and reversal of the judgment entered in said casue in the court below, to wit:

I.

The Court erred in making the following finding of fact:

“That the plaintiff has not any interest in or title to any of the lands and premises described in the complaint and is not the owner or entitled to the possession thereof.”

To which finding plaintiff excepted and exception was allowed.

II.

The Court erred in making the following conclusion of law:

“That plaintiff’s action should be dismissed and defendant recover his costs.”

To which conclusion plaintiff excepted and exception was allowed. [99]

III.

The Court erred in refusing to make the following findings of fact requested by plaintiff:

“That the plaintiff is the owner and entitled to the possession of the lands and premises described in the complaint and that the defendant has no interest therein and no right to the possession thereof.”

To which refusal plaintiff excepted and exception was allowed.

IV.

The Court erred in refusing to make the following conclusion of law requested by plaintiff:

“That said plaintiff is the owner in fee simple and entitled to the exclusive possession of the property described in the complaint, and that said plaintiff recover of defendant its costs.”

To which refusal plaintiff excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of defendant, to which entry of judgment plaintiff excepted and exception was allowed.

VI.

The Court erred in refusing to enter judgment in favor of plaintiff, to which ruling plaintiff excepted and exception was allowed.

VII.

The Court erred in holding that the plaintiff is not the owner or entitled to the possession of the premises described in the complaint.

VIII.

The Court erred in holding that plaintiff has no title to the land involved in this suit. [100]

IX.

The Court erred in holding that the Spokane tribe of Indians had a special claim to the lands embraced in the reservation at the time of the definite location of the railroad such as would except said lands from the operation of the grant to the company.

X.

The Court erred in holding that the lands in question had been set apart for the use of the Indians by both the civil and military authorities of the Government.

XI.

The Court erred in holding that it was not necessary to show that the officers who attempted to establish a reservation had authority to do so.

XII.

The Court erred in holding that the special claim of the Indians was not advanced or relied upon in the case of Northern Pacific Railway Company vs. Mitchell, 208 Fed. 469.

The plaintiff duly excepted to the rulings of the Court in the matter of each of the above errors assigned and hereby and now assigns each and every

one of said rulings as error.

(Signed.) EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff.

[Endorsements]: Assignments of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Assignments by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [101]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit
Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, Northern Pacific Railway Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said

United States District Court for the Eastern District of Washington, Northern Division, at the April term thereof, 1915, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfully shows that it has this day filed herewith its Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in-error in the prosecution of this, its suit in error.

WHEREFORE, the plaintiff prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a super-sedeas in said cause; and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 20th day of August, 1915.

EDWARD J. CANNON,
CHARLES DONNELLY,
Attorneys for Plaintiff. [102]

[Endorsements]: Petition for Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Petition by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [103]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

The plaintiff, Northern Pacific Railway Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ or Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having been this day duly allowed:

Now, therefore, it is ORDERED that upon the said plaintiff, Northern Pacific Railway Company, filing with the clerk of this Court a good and sufficient bond in the sum of One Thousand (\$1,000)

Dollars, payable to EMMA A. WISMER, the defendant in the above-entitled cause, to the effect that if said plaintiff, Northern Pacific Railway Company, and plaintiff in error, shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect, the said bond to be approved by the Court; that all further proceedings in this [104] suit be, and they are hereby suupended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 20th day of August, 1915.

(Signed.) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Allowing Writ of Error and fixing amount of Bond. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of the within order by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [105]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Northern Pacific Railway Company, a corporation, as principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Washington, as surety, are held and firmly bound unto EMMA A. WISMER in the full and just sum of One Thousand (\$1000) Dollars, to be paid to the said EMMA A. WISMER, to which payment well and truly to be made we bind ourselves and each of our successors or assigns, heirs, administrators, executors and legal representatives jointly and severally firmly by these presents.

Sealed with our seals and dated this 20 day of August, 1915.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court between the Northern Pacific Railway Com-

pany, as plaintiff and the said George F. Wismer, as defendant, a judgment was rendered in favor of said defendant and against said plaintiff, and Emma A. Wismer having been substituted as defendant for George F. Wismer, deceased, and the said Northern Pacific Railway Company has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a Citation directed to the said above-named defendant, Emma A. Wismer, [106] citing and admonishing her to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Northern Pacific Railway Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,

By EDWARD J. CANNON,
Its Attorney.

NATIONAL SURETY COMPANY,

[Corporate Seal]

By OSCAR CAIN,
Resident Vice-president.

Attest: By S. A. MITCHELL,
Resident Assistant Secretary.

The above and foregoing bond approved this 20th day of August, 1915.

(Signed.) FRANK H. RUDKIN,
United States District Judge.

[Endorsements]: Bond on Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within bond by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [107]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Citation on Writ of Error [Copy].

United States of America,—ss.

The President of the United States to Emma A. Wismer, and to Francis A. Garrecht, Your Attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a Writ of Error

filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Northern Pacific Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of United States this 20th day of August, One Thousand Nine Hundred Fifteen, and of the Independence of the United States the one hundred and fortieth.

[Seal] (Signed.) FRANK H. RUDKIN,
United States District Judge. [108]

[Endorsements]: Citation on Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Citation by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [109]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,

Defendant.

Writ of Error [Copy].

The President of the United States, to the Honorable Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, plaintiff in error, and Emma A. Wismer, defendant in error, a manifest error hath happened to the great damage of the said Northern Pacific Railway Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, in the State of California, on the 19th day of September next, in the said Circuit Court of Appeals to be then and there held; that the record and proceeding aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [110] that error what of right and according to the laws and customs of the

United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 20th day of August, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal] (Signed.) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

[Endorsements]: Writ of Error. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Writ by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [111]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F. WISMER, Deceased,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office

of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said Court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

1. Transcript on removal from the Superior Court of Stevens County, Washington, consisting of complaint, petition for removal, stipulation, order of removal and certificates of clerk to transcript on removal.

2. Answer.

3. Reply.

4. Stipulation Waiving Jury Trial.

5. Opinion.

6. Findings of Fact and Conclusions of Law.

7. Judgment.

8. Plaintiff's Proposed Findings of Fact and Conclusion of Law.

9. Plaintiff's Proposed Judgment.

10. Petition of Emma A. Wismer for Substitution.

11. Order Substituting Emma A. Wismer as Defendant. [112]

12. Notice of Filing Bill of Exceptions.

13. Bill of Exceptions and Certificate.

14. Assignments of Error.

15. Petition for Writ of Error.

16. Order Allowing Writ of Error and Fixing Bond.

17. Bond.

18. Citation.

19. Writ of Error.

20. Praecipe for Transcript of Record.

And any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) EDWARD J. CANNON,
CHARLES DONNELLY,
Attorney for Defendant.

[Endorsements]: Praecipe for Transcript. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

Due service of within Praecipe by receipt of a true copy thereof admitted this 20th day of August, 1915.

FRANCIS A. GARRECHT,
Attorney for Defendant. [113]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2195.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,

Defendant.

United States of America,

Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages are a full, true, correct and complete copy of so much of the record, pleadings, testimony and other proceedings had in the foregoing entitled cause as called for by the plaintiff and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remains on file and of record in the office of the Clerk of said District Court, and that the same constitute the record on Writ of Error from the Judgment of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which Writ of Error was

lodged and filed in my office August 20, 1915.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the fees of the Clerk of this Court for preparing and certifying to the foregoing record amounts to the sum of \$27.15, and that the same has been paid in full by Edward J. Cannon, attorney for plaintiff and plaintiff in error. [114]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 23d day of August, A. D. 1915.

[Seal]

W. H. HARE,
Clerk. [115]

[Endorsed]: No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 26, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable
Judges of the District Court of the United States,
for the Eastern District of Washington, North-
ern Division, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, or some of you,
between the Northern Pacific Railway Company, a
corporation, plaintiff in error, and Emma A. Wismer,
defendant in error, a manifest error hath happened
to the great damage of the said Northern Pacific Rail-
way Company, plaintiff in error, as by its complaint
appears:

We being willing that error, if any hath been,
should be duly corrected and full and speedy justice
be done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
records and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, in the State of California, on the 19th day of September next, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 20th day of August, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal]

W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

[Endorsed]: No. 2195. In the U. S. District Court, Eastern District of Washington, Northern Division. Northern Pacific Railway Company, Plaintiff, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant. Writ of Error. Due service of within Writ by receipt of a true copy thereof admitted this 20th day of August, 1915. Francis A. Garrecht, Attorney for Deft. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error.

Filed Aug. 26, 1915. Frank D. Monckton, Clerk
U. S. Circuit Court of Appeals for the Ninth Cir-
cuit. By Meredith Sawyer, Deputy Clerk.

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

vs.

EMMA A. WISMER, Substituted for GEORGE F.
WISMER, Deceased,
Defendant.

Citation on Writ of Error [Original].

United States of America,—ss.

The President of the United States to Emma A. Wis-
mer, and to Francis A. Garrecht, Your Attorney,
Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Appeals
for the Ninth Circuit to be held at San Francisco, in
the State of California, within thirty (30) days from
the date of this writ, pursuant to a Writ of Error filed
in the clerk's office of the District Court of the United
States for the Eastern District of Washington,
Northern Division, wherein the Northern Pacific
Railway Company, a corporation, is plaintiff in error
and you are defendant in error, to show cause, if any
there be, why judgment in said Writ of Error men-
tioned should not be corrected and speedy justice

should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of United States, this 20th day of August, One Thousand Nine Hundred Fifteen, and of the Independence of the United States the one hundred and fortieth.

[Seal]

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: No. 2195. In the U. S. District Court, Eastern District of Washington, Northern Division. Northern Pacific Railway Company, Plaintiff, vs. Emma A. Wismer, Substituted for George F. Wismer, Deceased, Defendant. Citation on Writ of Error. Due service of within Citation by receipt of a true copy thereof admitted this 20th day of August, 1915. Francis A. Garrecht, Attorney for Deft. Filed August 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

No. 2642. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Filed Aug. 26, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

9
No. 2642.

United States Circuit Court of Appeals.
FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

EMMA A. WISMER, substituted for GEORGE F. WISMER,
Deceased,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES W. BUNN,
EDWARD J. CANNON,
CHARLES DONNELLY.

Filed

No. 2642.

United States Circuit Court of Appeals.
FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

EMMA A. WISMER, substituted for GEORGE F. WISMER,
Deceased,
Defendant in Error.

STATEMENT.

This case involves but a single question, namely, whether the lands sought to be recovered in it, and which lie within the place limits of the grant to the Northern Pacific Railroad Company, were excepted from that grant because of being either reserved or claimed by the Indians at the date of the definite location of the Northern Pacific Railroad. The facts are as follows:

By Section 3 of an act approved July 2, 1864, (13 Stat. 365) Congress incorporated the Northern Pacific Railroad Company and made a grant of lands to it. This Court is familiar with the language of the grant, but we print it here so that it may be referred to conveniently.

“Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the ‘Northern Pacific Railroad Company,’ its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said ‘Northern Pacific Railroad Company,’ or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections.

nearest to the line of said road, *and within fifty miles thereof*, ⁽¹⁾ may be selected as above provided: *And provided, further*, That the word 'Mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.' "

When the act was passed and for years thereafter bands of Indians roved about upon much of the territory through which the railroad is now built. In the summer of 1877, some of these had commenced hostilities against white settlers and sought to induce others, including those residing on the lands in controversy, to join them. In August, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was an Indian inspector representing the Department of the Interior, General Frank Wheaton and Captain M. C. Wilkinson of the United States Army. At this council the chiefs and head men of the Spokane Tribe of Indians agreed that they would accept for their reservation a certain tract of land, including the land in controversy, and that they would move upon it by the first of November with a view of establishing permanent homes. (Tr. 56.) This agreement was as follows:

"We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Col-

(1) The italicized words, "and within fifty miles thereof," do not appear in this section as it is printed in the Statutes at Large, but they are in the act as passed and approved, and as recorded in the State Department. 29 Op. A. G. 498, 41 L. D. 571. The question involved in this case, however, is in no way affected by them.

umbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder."

On August 18, 1877, the day when this agreement was taken from the Indians, Inspector Watkins wrote to Brigadier-General Howard of the Department of the Columbia, advising him that he had "decided to recommend" the reservation described in the agreement (Tr. 75), and on August 23, 1877, he reported to the Commissioner of Indians to the same effect, that he had "decided to recommend" that such a tract of land be set apart for them. (Tr. 73.) Thereafter, on November 14, 1877, he located the Spokane Indians on the tract described, and he reported his action to the Commissioner of Indian Affairs on the same day. (Tr. 57-58.) What appears to have been this same report, though bearing date November 26, 1877, (Tr. 78) was transmitted by the Commissioner of Indian Affairs to the Secretary of the Interior January 22, 1878, and by the Secretary of the Interior to the United States Senate January 23, 1878. (Tr. 58.) The two letters transmitting this report though not copied in this record appear on pages 472-473 of 208 Fed.

In August, 1880, the Indians were disturbed by attempts of squatters to locate on the lands set apart and September 3, 1880, Brigadier-General Howard made the following order:

“HEADQUARTERS DEPARTMENT OF THE COLUMBIA.

In Field, Spokane Falls, W. T.

September 3, 1880.

SPECIAL FIELD ORDERS.

No. 8.

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to-wit: Commencing at the mouth of the Cham-a-kane Creek, thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Forts Coeur d'Alene and Colville and Camp Chelan, are charged with the proper execution of this order.

By command of Brigadier-General Howard.”

Thirty-one days thereafter, October 4, 1880, the Northern Pacific Railroad Company filed its map of definite location opposite the lands in question (Tr. 51) which lie within the place limits of the grant as shown by that map. (Tr. 52.) About three and a half months after definite location, President Hayes made the following order (Tr. 60):

“Executive Mansion, January 18, 1881.

“It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane river westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence east along said parallel to the place of beginning.

R. B. HAYES."

The lands along the line, with the exception of the lands thus set apart, were surveyed in 1887. (Tr. 52.) The reservation itself was surveyed in 1906.

By Act of Congress of May 29, 1908 (35 Stat. 458) the Secretary of the Interior was authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who might rightfully belong on the Spokane Indian Reservation and who had not theretofore received allotments. The Act further provided that upon the completion of the allotments the Secretary of the Interior should classify the surplus lands as agricultural and timber lands, and that the lands classified as agricultural lands should be open to settlement and entry under the homestead laws of the United States by a proclamation of the President which would prescribe the time and the manner in which the land might be settled upon, occupied and entered by persons entitled to make entry thereof, and that no person should be permitted to settle upon, occupy or enter any of such lands except as prescribed in the proclamation. By other provisions of the act the United States acted as trustee for the Indians in disposing of the surplus lands

and the purchase price of \$5.00 per acre was credited to the Spokane Tribe.

The Northern Pacific Railway Company, plaintiff in error, (which had in the meantime succeeded to the rights of the Northern Pacific Railroad Company) asserted its right to the odd-numbered sections of the so-called reservation lying within the place limits of the grant. Its claim was rejected by the Secretary of the Interior (Tr. 61-64) and this decision was affirmed on review. (38 L. D. 496.) It notified all entrymen of its claim to the odd-numbered sections (Tr. 52-54) and upon patents being issued to the entrymen (patent was issued to defendant in error April 9, 1913, Tr. 60) it began actions of ejectment against them, the present action being one of them. The first of these actions to be tried was that of Northern Pacific Railway Company v. Mitchell. As in the present case, the United States Attorney at Spokane appeared for the defendant. It was contended on behalf of defendant in that action that the land in question was *reserved* before map of definite location was filed. This contention was rejected by Judge Rudkin in the court below and judgment was entered in favor of the railway company. His opinion appears in 208 Fed., beginning at p. 470. A writ of error to this court was sued out by the United States Attorney to review Judge Rudkin's decision, but as more than six months had elapsed this court was without jurisdiction and no further proceedings having been had the writ of error was dismissed by this court May 11, 1914. In order to get a definitive judgment upon which the Department of the Interior might act, it became necessary to press to a decision another one of the ejectment cases and accordingly the present case was brought on for hearing.

In the present case Judge Rudkin, while adhering to his original decision that the lands were not reserved (Tr. 38), decided that at the time of definite location the Indians had *a special claim* to them and directed judgment to be entered against the railway company. It is to review this decision that the present writ has been sued out.

ASSIGNMENT OF ERROR.

The Court erred in holding that the Indians had a special claim to the lands in question at the time of definite location of the railroad.

ARGUMENT.

That the lands in question were public lands on July 2, 1864, stands admitted; and, as they lie within the place limits of the grant, title to them vested in the railroad company October 4, 1880, when map of definite location was filed, unless between those two dates something was done which operated to throw them into one or the other of the excepted classes. The only things suggested as having that effect are the acts of Watkins in 1877 and the order of General Howard on September 3, 1880. The court below held in *Northern Pacific Railway Co. v. Mitchell*, 208 Fed. 470, that these acts did not operate to reserve the lands; and it remains of that opinion. (Tr. 38.) It considers, however, that they did operate to give to the Indians a special claim upon them, and therefore it is now of the opinion that they were within one of the excepted classes when map of definite location was filed, and that the railroad took no title to them.

It is, of course, a matter of indifference, as regards the ultimate disposition to be made of this case, into which one of the excepted classes the lands are said to fall. Whether excepted because reserved or because a claim had attached to them, it is the acts of Watkins and Howard that are relied upon as creating the exception. It is not contended, and cannot be contended, that because they were a part of the Indian country at the date of the grant a claim existed which operated to except them. Against such a contention *Buttz v. Northern Pacific Railroad Co.*, 119 U. S. 55, is conclusive. From whatever angle the case is approached, therefore, the decision of the court below

is that lands which otherwise would have passed to the Railroad Company were lost to that company because of what was done by Watkins and Howard previous to the date of definite location. The single question, then, is, did either Watkins or Howard have the power or the authority to create or initiate rights in the public lands? If they did the case has been rightly decided; but it is as accurate to say that they created a reservation as to say that they created a claim, for they had as much authority to create the one as the other. If they did not we are entitled to a reversal.

By Article IV, Section 3 of the Constitution of the United States, the power to dispose of public lands is broadly conferred upon Congress. For many years, however, the practice of withdrawing lands from the operation of general laws and creating reservations has been followed by the Executive; and in the recent case of *United States v. Midwest Oil Co.*, 234 U. S. 459, the court discusses the question of the right of the Executive to pursue this practice. The right was ~~sustained~~ by a divided court, and it seems clear from the opinion that, following the doctrine of *Wilcox v. Jackson*, 13 Pet. 513, the act of the Secretary of the Interior would be treated as the act of the Executive. Beyond this, however, the decision does not go. It has never been suggested that such right or authority reposed in the subordinates of any department. As said by the court below in *Northern Pacific Railway Company v. Mitchell*, *supra*, at page 472:

“So far as I am advised, no such power has been delegated to other subordinate officers of the government, whether civil or military, and the acts of such officers, without authorization from the President or from Congress, are *ineffectual for any purpose*.”

In *United States v. Tichenor*, 12 Fed. 415, the effect of a similar order made by a subordinate officer of the War Department was considered by Judges Sawyer and Deady. The court said:

“It may be admitted, as suggested in *Wilcox v. Jackson*, 13 Pet. 513 (10 L. Ed. 264), that if the order directing the reservation to be made had been issued by the Secretary of War, the head of the department through whom the president would speak and act upon the subject, in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the President. But neither Gen. Hitchcock nor Lieut. Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President, and there is no presumption of law that they were. It may also be admitted that Gen. Hitchcock could direct his subaltern, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein, or that the latter might do so under the circumstances without any direction from the former. But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act, and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler.”

This language was quoted by the Supreme Court in *Scott v. Carew*, 196 U. S. 100.

Moreover, apart from any question of power or authority there is the question whether either Watkins or Howard *professed* to be initiating rights in these lands. We think it apparent from the slightest inspection of the communications of Inspector Watkins that he does not arrogate to himself the authority necessary to set these lands

apart or to create a claim upon them. His account of the council, as contained both in his letter to General Howard of August 18, 1877 (Tr. 75), and his report of August 23, 1877 (Tr. 73) was that he “decided *to recommend*” that a tract of land be set apart. The Commissioner of Indian Affairs, in transmitting his report to the Secretary, concurs in his “recommendations” and “would like to see *the proposed plan* adopted with the least delay possible.” (Tr. 79.) The Secretary of the Interior, in transmitting the correspondence to the Senate (see letter of January 23, 1878, printed in 208 Fed. at p. 473) describes the Commissioner’s letter as “*recommending* the adoption in part of the *plan* of the Inspector”; and he suggests “such appropriate legislation by Congress as will enable the Department to carry it into effect.” Again, it is apparent from the order of General Howard of September 3, 1880, that the Indians themselves were aware that Watkins had closed no agreement with them for they are described (Tr. 82) as “expecting the executive order in their case.” And finally, as pointed out by the court below in the Mitchell case (208 Fed. 473), General Howard’s order “shows very plainly on its face that it was a temporary emergency order, made by him on his own responsibility, by virtue of his authority as an army officer, to maintain peace among the Indians.”

The doctrine of the court below that while the action of Watkins and Howard was not sufficient to create a reservation, it was yet sufficient to create a claim, gives to the term “claim” as used in railroad grants a meaning never heretofore given to it. That term is never taken to mean a mere asserted right however strong may be the moral

grounds on which the assertion is rested. To be such a "claim" as will except lands from a grant it must have a definite and authentic legal status. The rights of homesteaders, for instance, may be initiated by settlement and occupancy; but if, at definite location, the settler, with an opportunity to make his entry, has not done so the railroad title attaches notwithstanding his claim. In *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 386, the court said:

"If it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office."

So, also, in *Whitney v. Taylor*, 158 U. S. 85, 94, the court, speaking of pre-emption claims, said:

"But it is also true that settlement alone without a declaratory statement creates no pre-emption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim."

In *Tarpey v. Madsen*, 178 U. S. 215, the court said:

"A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual,

but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office."

So in *Northern Pacific Railroad Company v. Allen*, 27 L. D. 286, the Department of the Interior, said:

"Non-mineral land is not excepted from the grant to the Northern Pacific by reason of a 'claim' thereto under the mining laws, unless the claim is one which has been asserted before the local land office, and is pending of record there, at the time the line of the road is definitely fixed."

The court below cites and apparently relies on *Northern Pacific v. Musser-Sauntry Company*, 168 U. S. 604; *Northern Lumber Company v. O'Brien*, 204 U. S. 190; *U. S. v. Southern Pacific Company*, 146 U. S. 570; *Newhall v. Sanger*, 92 U. S. 761; and *U. S. v. Southern Pacific Company*, 76 Fed. 134. A very striking thing about these cases, in view of the court's reliance upon them, is that no one of them is concerned with the question of *exceptions* from a railroad grant. Each of them deals only with the question whether the lands under consideration in the particular case were, *at the date of the grant*, lands of the character granted.

In the *O'Brien case* the question was whether lands withdrawn in May, 1864, as being within the prescribed limits of the general route of the Lake Superior & Mississippi Company, were public lands so as to pass to the Northern Pacific Company under its grant of July 2, 1864, and it was held that they were not.

In the *Musser-Sauntry case* it was held that, because of the withdrawal from sale of lands under a grant of which

the Chicago, St. Paul, Minneapolis & Omaha Railway Company was the beneficiary, they were not public lands so as to pass to the Northern Pacific Company by its grant of July 2, 1864.

In the *Southern Pacific case* it was held that lands within the place limits of the grant of July 27, 1866, to the Atlantic & Pacific Railroad Company were not public lands so as to pass to the Southern Pacific Company under a later grant of March 3, 1871.

In *Newhall v. Sanger* it was held that lands, which, at the date of the grant were claimed to be part of a Mexican grant at that time *sub judice* were not public lands so as to pass to the railroad company under the grant.

A similar proposition was involved in *U. S. v. Southern Pacific Company*, 76 Fed. 134, where it was held that because at the date of the grant the lands in question had been applied for by the State of California and so "were taken out of the category of public lands within the meaning of the railroad grant."

This distinction between cases dealing with what was granted and cases dealing with what was excepted from a grant is by no means unimportant here. Two things are necessary to a valid title under the grant to the Northern Pacific Company: (1) That at the date of the grant the lands shall have been lands of the character granted (i. e., public lands), and (2) that being lands which at the date of the grant were of the character granted, they shall not, between that date and the date of definite location, have fallen into any of the excepted classes. The question what the grant covered at its date is one thing. The question what was thereafter excepted from it is another thing.

Now the cases cited and relied upon by the court below deal only with the question what was embraced within the grant at its date, and that question is not involved here in the slightest degree. Beyond all controversy, these lands, on July 2, 1864, were public lands. True they were a part of the Indian country referred to in the second section of the Act; but the fee was in the United States and the grant passed title to them. This question is definitely settled by *Buttz v. Northern Pacific Railway Company, supra*. It is absolutely certain that if the map of definite location had been filed at any time previous to 1877, the Northern Pacific Railway Company would have taken title to them, and as we have said, if title is not now in the Railway Company, it can be only because after the date of the grant and before filing of map of definite location, two subordinate officers of the Government, whose acts are described by the Court below in the *Mitchell case* as "ineffectual for any purpose," entered into negotiations with the Indians concerning them.

The court below, speaking of General Howard's order, says (Tr. 33) that it was promulgated "*with the concurrence and approval of the Secretary of War and the Secretary of the Interior.*" If this statement were true, it would indeed change the aspect of the case; and as the court, of course, supposed it to be true, the decision may be accounted for upon this ground. But we think it certain that the court below is mistaken here. There is not in the record a word to suggest, nor has any one heretofore suggested, that either the Secretary of War or the Secretary of the Interior concurred in or approved of General Howard's order. There is not, indeed, a word to suggest that

the Secretary of the Interior *even knew* of it, to say nothing of concurring in or approving of it. It appears that on August 31, 1880, three days before the date of the order, General Howard telegraphed the Adjutant General at Washington to get "authority from the President or Secretary of the Interior to declare a straight (strip?) eight miles broad temporarily withdrawn from settlement." (Tr. 80.) This telegram the Chief Clerk for the Secretary of War transmitted to the Secretary of the Interior on September 1, 1880, without any recommendation. (Tr. 80.) All that we know as to what was done by the Secretary of the Interior on receipt of this telegram is what we gather from a letter addressed to him by the Secretary of War on January 15, 1881, more than three months after map of definite location was filed. (Tr. 82.) We quote this letter in full:

"January 15, '81.

Sir: I have the honor to acknowledge the receipt of your letter dated the 7th of September, last, enclosing one from the Commissioner of Indian Affairs, in reply to letter from this Department transmitting copy of telegram from General Howard, dated Spokane Falls, W. T., August 31st, last, in which he states that 'White settlements are beginning on unsurveyed lands claimed by Spokane Indians between Chamakine Creek and the Columbia along Spokane River,' and asking authority from the President to declare a *straight* eight miles broad temporarily withdrawn from settlement.

In reply to your request that General Howard be instructed to forward a description by natural objects of the tract of country which he desires reserved for the protection of said Indians, I beg to enclose herewith a description and plat of the lands referred to.

Very respectfully,

Your obedient servant,

ALEX. RAMSEY,

Secretary of War.

The Honorable, The Secretary of the Interior."

This is every word which the record contains on the subject. Does this suggest that General Howard's order was promulgated with the concurrence or approval of the Secretary of War or of the Secretary of the Interior? Does it not, on the contrary, make it very plain that it was not, and that the Secretary of the Interior did not even know that such an order had been made? On September 7, four days after the order was promulgated, the Secretary of the Interior was asking for a description of the tract which General Howard "desires reserved"; and this information the Secretary of War does not give to him until more than four months thereafter. How can it be said in the face of these facts that the Secretary of the Interior or the Secretary of War gave their concurrence or approval to the order?

The court below says :

"It is idle now to enquire whether these officers had technical authority under the law to establish a reservation. The parties were not dealing on an equal footing. A powerful Government was treating with an inferior race, and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders."

With the most sincere respect and deference, we submit that this language ignores altogether the very point at issue, namely, the question of prior rights. We are not considering what moral obligation may rest upon the Government as the result of Watkins' negotiations, but whether as matter of law any rights were initiated by them—whether, as matter of law, they were "effectual for any

purpose." The court below has said that they were not, and this court must go far beyond the doctrine of the *Midwest Oil case* before it can be affirmed that they were. As they were not, the rights of the railroad company attached to the lands on October 4, 1880. Putting the case for the Indians on the most favorable ground, there was outstanding on that day two obligations on the part of the Government, one a moral obligation, having no legal standing because created only by those who were without authority to create it; and the other the obligation to the railroad company contained in the grant of July 2, 1864. No rights or claims to specific lands, in favor of either of the obligees could come into existence until the Executive had acted in the one case or until map of definite location had been filed in the other. The map of definite location was filed before the executive acted, and, therefore, the rights of the railroad company attached. To say that under such circumstances we are to disregard the technical rules of law by which they attached, is to say that faith is to be kept with one obligee by breaking faith with the other.

That it would be wrong, that it would even be an "act of perfidy" for the Government not to give to the Indians the full equivalent of what they expected to get may be conceded. Certainly it is not necessary to our case to deny it. But why are we to suppose that the Government will be guilty of this act of perfidy? The Indians went upon the land which they agreed to accept and remained there unmolested for more than thirty years. The lands were then surveyed and Congress provided that they should be allotted to individuals or converted into cash. When surveyed, the railroad company, for the first time,

asserted its rights to the odd-numbered sections in that portion of the reservation which lay within place limits. If by the technical rules of law those rights are valid, it is the duty of the court to recognize them. The Government stands before the court precisely as any other litigant stands before it. It is no part of the court's duty to deny to one litigant rights given to it by the rules of law upon the ground that a breach of faith might thereby result to the other, even if there were real ground for the apprehension of such a breach. But there is none. As a part of its contract with the Northern Pacific Railroad Company, Congress, in the second section of the act, agreed to extinguish the Indian title to all lands falling under the operation of the act. It now appears that a part of the consideration which the Indians had expected to receive for the extinction of this title has failed. This situation is not unusual. Similar situations arise frequently, and there is not the slightest reason to suppose that Congress will not do in this case what it has frequently done in other cases, namely, by a cash equivalent or in some other way make good the loss which the Indians would otherwise suffer.

CHARLES W. BUNN,
EDWARD J. CANNON,
CHARLES DONNELLY.

IN THE
Circuit Court of Appeals
OF THE
UNITED STATES

Ninth Judicial Circuit

NORTHERN PACIFIC RAILWAY
COMPANY,

Plaintiff in Error,

VS.

EMMA A. WISMER, substituted for
GEORGE F. WISMER, deceased,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

Brief of Defendant in Error

FRANCIS A. GARRECHT,

United States Attorney,

Eastern District of Washington.

IN THE
Circuit Court of Appeals
OF THE
UNITED STATES
Ninth Judicial Circuit

NORTHERN PACIFIC RAILWAY
COMPANY,

Plaintiff in Error,

VS.

EMMA A. WISMER, substituted for
GEORGE F. WISMER, deceased,

Defendant in Error.

THE ISSUE.

If the evidence establishes the facts hereinafter stated, the legal conclusion follows that the lands and premises described in the complaint, on October 4, 1880, the date of the filing of the map of definite location, as well as all odd numbered sections in the Spokane Indian Reservation, were not public lands within the meaning of the granting Act of July 2, 1864 (13 Stats. L. 365); but that the same had been reserved, appropriated and set aside for the Indians and were occupied by them as their reservation and

were subject to their claims and rights and no title or interest therein whatsoever passed to the Northern Pacific Railroad Company.

FACTS ESTABLISHED.

On August 16, 1877, all the unsurveyed territory now comprising Eastern Washington was Indian country and the lands within the boundaries of what was thereafter designated as the Spokane Indian Reservation in the State of Washington, and in which the lands described in the complaint herein were embraced, were occupied, used, enjoyed and claimed by the Indians, and they had never ceded any part thereof or any interest therein to the Government of the United States, and that during all of said time none of the rights and claims of said Indians in and to the said lands and premises had been extinguished. (Transcript of Record pp. 54-55).

These roving bands of uncontrolled Indians, especially those on the Columbia River, were a source of annoyance and danger, and Colonel E. C. Watkins, United States Indian Inspector, was, on May 7, 1877, directed by the Commissioner of Indian Affairs to gather these Indians upon permanent Reservations; and, further, that he should give them distinctly to understand that their absence from reservations would no longer be permitted. In order to accomplish the desired result, said Inspector was directed to co-operate with General Howard. (Transcript p. 69).

In the month of June, 1877, certain Indian bands

and tribes of the Northwest country had begun hostilities upon, and had committed depredations against white settlers in the Indian Country in Eastern Washington and Oregon and Northern Idaho, and for a long time thereafter continued to menace the white population living in said territory. That said Indians who had gone upon the warpath sought to induce others of their race who were engaged in peaceful pursuits to join in these wars, hostilities and depredations. That among the peaceful Indians, which those at war were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian Reservation. (Transcript p. 55).

In pursuance of the directions of the Commissioner of Indian Affairs, and upon August 16th, 17th and 18th, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and there an Indian Inspector representing the Department of the Interior acting in his official capacity; General Frank Wheaton and Captain M. C. Wilkinson, of the United States Army, representing the War Department, and General Howard. (T. p. 70).

At said council, said Inspector Watkins made the following statements and representations to said Indians:

"We want to find out the feeling of the Indians here towards the whites. Some Indians have been roaming over the country. The policy of the Government is to place Indians on reservations. * * *"

"The Commissioner of Indian Affairs, Secretary of the Interior, President of the United States, have all decided that it is best for all Indians to go upon reservations. The President of the United States gives the Indians more land than he does the white man. The reserve proposed for the Spokanes gives to each Indian more land." (T. p. 70).

Colonel Watkins then described to the said Indians the proposed reservation which the Indians later agreed to accept and in relation thereto further said: "If I did not think it was a good reserve in every particular, I would not urge it upon you." (T. p. 71).

Thereupon, in order to carry out the instructions of the Executive Department of the Government, as a means of influencing said Indians to continue in friendly relations with the whites, and to remain at peace with the United States and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder; and for the purpose of collecting the said Indians belonging to the said tribe on a reservation, thereto engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of said Indians to all other lands not within the said reservation, the following agreement was entered into:

IN COUNCIL AT SPOKANE FALLS, W. T.

August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described lands for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek

to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:
E. C. Watkins,
U. S. Indian Inspector.

Names:

Whistle-poo-Sum	his X	Spokane mark
Quis-e-me-ow	his X	Spokane mark
Ah-mi-melechin	his X	Spokane mark
Cos-to-akan	his X	Spokane mark
Ora-pa-han	his X	Spokane mark
Paul	his X	Ora-pa-han mark

Frank Wheaton,
Bt. Major Gen. U. S. Army,
Col. 2d Infantry.
M. C. Wilkinson,
Bvt. Capt. U. S. Army,
Aide de Camp.
(Transcript p. 74, p. 56).

In pursuance of said agreement, the Indians already on said lands agreed to remain thereon, and others not so located agreed to go upon said lands, which it was agreed should be a Reservation for such Indians.

Thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said Reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said agreement and claimed the same as their reservation continuously thereafter until the year 1910, when the same was opened to settlement by Act of Congress and the Proclamation of the President. (T. pp. 57, 66, 67).

The action of the said E. C. Watkins in locating said Indians upon said reservation was by him reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23rd, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed. (T. pp. 58, 85, 86).

In November, 1877, said Indians went upon said lands in compliance with said agreement and at all times thereafter claimed the same as their Reservation, and were expecting and relying upon the issuance

of the Executive order which was made in January, 1881. (T. pp. 64, 65, 66, 67).

Said Indians, after November 14, 1877, and long prior to October 4, 1880, established permanent homes on said Reservation and many of them fenced their lands, engaged in agricultural pursuits, and made valuable improvements. (T. pp. 66, 67, 92, 93).

About August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by them as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council and preserving peace between the Indians and white settlers, Brigadier General Howard, of the Department of the Columbia, with the approval of the Secretary of War and the Secretary of the Interior, made an order directing that the land above described be protected against settlement by others than said Indians, until a survey could be made or until further instructions were received, which order was as follows:

MILITARY ORDER

HEADQ'RS. DEPT. OF THE COLUMBIA
IN THE FIELD SPOKANE FALLS, W. T.

September 3, 1880

FIELD ORDER No. 8

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians

the following described territory, to-wit: Commencing at the mouth of Cham-a-kane Creek, thence north eight miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlements by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding Officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier General Howard,

H. H. PIERCE,
1st Lieut. 21st Infantry, Acting
Aide-de-Camp.

Official.

(T. pp. 58-59).

That said order was made by the authority of the War Department with the concurrence of the Department of the Interior, and with the approval of the Secretary of War and of the Secretary of the Interior. (T. pp. 79, 80, 81, 82).

That the lands so reserved, which included the lands described in the complaint, were so set apart in pursuance of the said agreement made between said Indians and the United States, acting by and through said E. C. Watkins, Indian Inspector as aforesaid,

for the exclusive use and occupancy of said Indians and for their care and protection.

That said agreement with the Indians, and the said order creating and setting aside said tract of land as a Reservation were not revoked, but were recognized and confirmed by the Secretary of War and the Secretary of the Interior, and approved and sanctioned by the President of the United States.

The formal order and proclamation thereof was made on January 18, 1881, and is as follows:

EXECUTIVE MANSION

January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chema-kane Creek crosses the forty-eighth parallel of latitude; thence down the East bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence East along said parallel to the place of beginning. (T. p. 59, 60, 79, 80, 81, 82).

The said Reservation was established in August, 1877, was claimed, used and occupied as such by said Indians at all times subsequent to November, 1877, and was set apart and protected against settle-

ment by other than said Indians from and after September 1, 1880.

Said matters were of public notoriety, were known to Congress, and the Executive Department of the Government; and the rights and claims of said Indians to said Reservation were continuously recognized and protected, and the lands reserved, apportioned and set apart for said Indians by the Government from a time long prior to October 4, 1880. (T. pp. 79, 80, 81, 82, 85, 86).

That the lands described in the complaint were a part of said Reservation which was actually set apart to said Indians and claimed by them as such continuously after August 18, 1877, and actually, uninterruptedly occupied, used and enjoyed by them as such from November 14, 1877, to and including the time of approval of said Act of May 29, 1908. (T. pp. 66, 67, 92, 93).

Under the Act of Congress approved May 29, 1908, (35 Stats. L., 458) and the proclamation of the order of the President of the United States of May 22, 1909, the said tract of land became subject to homestead entry, and on or about April 2, 1910, at the United States Land Office, in the City of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint, which entry was duly accepted by the Register and Receiver of said Land Office.

On April 9, 1913, patent to said land was issued to this defendant, and by virtue of his said entry and the patent thereafter issued to him, defendant en-

tered into the possession of said premises on or about April 2, 1910, and ever since has continued to, and now does, occupy the same.

That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L., 365); but said claim was denied and on appeal decided by the Secretary of the Interior adversely to the contention of plaintiff herein.

That said decision was upon questions of mixed fact and law and was in words and figures following:

DEPARTMENT OF THE INTERIOR

926

WASHINGTON

G. B. G.

Mar. 7, 1910.

Commissioner of the
General Land Office:

Sir:

This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said Company to 64,000 acres of land, falling within the place limits of the grant made to said Company by the Act of July 2, 1864 (13 Stat., 365) because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 (35 Stat., 458).

It appears from your said office decision and it is not disputed that in August 1877, E. C. Watkins, an Indian Inspector of this Department,

had a conference with the Spokane Indians and set apart or promised to have set apart for their use a certain tract of land; That on November 26, 1877, said Inspector made a report to the Commissioner of Indian affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said report he refers to the Colville Indian Reservation, in which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians North of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Sims, United States Indian Agent, Colville Agency, Washington, shows that the Spokane Indians, numbering 685, "are living along the Spokane River and vicinity from Spokane Falls to its junction with the Columbia," these being the same lands set apart for them by Inspector Watkins: and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant 21st Infantry, by command of Brigadier General Howard, proclaimed in special field order No. 8, Headquarters Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians described the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace until the pledge of the Government should be fulfilled or other arrangements accomplished. The Executive order setting apart said Indian Reservation is dated January 18, 1881, and described the lands practically the same as in said order No. 8.

The definite location of the Northern Pacific Railway's line of road coterminous with and opposite the lands in question, was made October 4, 1880. It thus appears that the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation created by the said H. H. Pierce, September 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation January 18, 1881.

Your office decision holds that negotiations of the said E. C. Watkins, the facts stated in said report of John A. Sims, United States Indian Agent, and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal, except the case of *Buttz v. Northern Pacific Railway Company*, 119 U. S., 55, which, it is contended, is authority for the contention of the Company that these lands had not been withdrawn prior to January 18, 1881, and that they were, therefore, subject to the Company's grant October 4, 1880. The case cited is not in point and furnishes no authority for the contention made.

The fact of the negotiations and of the military order above referred to is not denied upon the appeal, but the legal effect of these proceedings is disputed.

Upon a careful consideration of the subject, it is believed that these proceedings constitute such reservation of the land in questions as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed and your office will proceed to the disposition of these lands in accordance with the provisions of the Act of May 29, 1908, *supra*. (T. pp. 61, 62, 63, 64).

The Executive Department of the Government and the Congress of the United States, ever since November, 1877, have recognized the agreement signed by said Indians as initiating their valid claim to said reservation, and the same was, in pursuance thereof, set apart, reserved and appropriated for them by the President. (T. pp. 60, 85, 87, 88).

By virtue of the agreement, orders, acts and proclamations aforesaid, the said Indians in 1877 relinquished all their claims and rights in and to the other lands in Washington Territory and retired upon, and permanently established themselves upon, the said Spokane Indian Reservation, and thereby the Indian title to the other lands within the grant was extinguished and the predecessor in interest of the said plaintiff, with full knowledge of the facts, and well aware that the said Indians believed that the lands set apart and reserved for them comprised a valid Indian Reservation, and that relying thereon said Indians had relinquished all claims to other lands within said grant, and said predecessor of the plaintiff acquired the immediate occupation, use, enjoyment and title of lands within the grant so relinquished by said Indians which it otherwise would not have had. (T. pp. 66, 67, 52).

POINTS PRESENTED.

The Government is interested in this case for the reason, as appears in the record (T. p. 89), that Indians of the Spokane Tribe have been allotted lands in odd sections of what was the Spokane Indian

Reservation, and of which they will be deprived if the contention of the plaintiff should prevail.

The Government, therefore, contends:

I. That the odd sections of land in the Spokane Indian Reservation were not within the grant to the Railroad Company because they were not public lands in the full sense required to pass by the Act; but were excepted therefrom for the reasons:

- a. They were subject to other "claims or rights."
- b. They were "otherwise appropriated."
- c. They were "reserved."

The Court below rested its decision upon the point that these lands were not public lands, which was sufficient.

But we insist that the plaintiff is here precluded from recovery on other grounds:

II. The question here involved is one of public policy, and, therefore, a political question not within the province of the judiciary.

III. The question here involved is one of mixed fact and law, which has been determined by the Interior Department, adversely to the plaintiff, and that decision will not be interfered with by the Courts.

IV. By the agreement and the retirement of the Indians to the Reservation in question in pursuance thereof, great benefit accrued to the Railroad Company, which it accepted, acted upon and has enjoyed to the detriment of the Indians; and the plaintiff corporation, by reason thereof, should be estopped from now asserting that said Indians acquired no rights in the premises.

AUTHORITIES CITED:

I. CONSTRUCTION OF THE ACT IN QUESTION:

In construing this Act the Supreme Court has repeatedly held:

That Congress intended that only such lands should pass to the Northern Pacific by the grant "as were public lands in the *fullest* sense of the term," and which were "at the time of definite location of its road free from all reservations and appropriations, and all rights and claims."

N. P. R. R. Co. v. Musser et al., 168 U. S., 608;

N. P. R. R. Co. v. Saunders, 166 U. S., 620;

Northern Lumber Co. v. O'Brien, 204 U. S., 200.

The Circuit Court of Appeals for this Circuit has also so held.

N. P. v. Maclay, 61 Fed., 555.

N. P. v. McCormick, 94 Fed. 940.

The language of the statute, and public policy as well, confined the grant to land which could be rightfully bestowed, "without disturbing existing relations and producing vexatious conflicts."

Leavenworth, Lawrence, etc., v. U. S., 92 U. S., 733.

No one can read the restrictive terms of the Act without being impressed with this fact.

The grant to the plaintiff was only of lands which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from

preemption, or other claims or rights at the time the line of said road is definitely filed."

Nelson vs. N. P. Ry. Co., 188 U. S., 108.

N. P. Ry. Co. vs. Trodick, 221 U. S., 208.

Affirming Circuit Court of Appeals, Ninth Circuit, in 164 Fed., 915.

The construction of the grant to be strict against the railroad company.

D. & Pac. R. R. Co. v. Litchfield, 64 U. S., 88.

The construction of the agreement to be liberal in favor of the Indians.

N. P. R. R. Co. v. U. S., 227 U. S., 366.

All lands "otherwise appropriated," "reserved," or which were the subjects of "other claims or rights," are excepted from the grant. This language is broad and comprehensive and unless it is given technical and narrow interpretation it must unquestionably take these reservation lands out of the operation of the grant.

It is no longer open to dispute that the rights or claims of preemptioners or homestead settlers initiated prior to the definite location of the road will except lands from the grant.

A construction of the statute that would protect settlers and refuse the same application of it to lands appropriated for Indian occupation, would be more subtle than sound.

Leavenworth, Lawrence, etc. v. U. S., 92 U. S., 747.

RIGHTS AND CLAIMS OF THE INDIANS.

The execution of the treaty agreements and the action thereon by the Indians and by the Government officials prior to the filing of the map of definite location, created an inchoate title, the equities of which the Government was bound in good faith to maintain.

This incomplete title, coupled with the Indian occupancy as a reservation, was such a right and claim as excepted the reservation from the grant.

In this Act the words "claims" or "rights" are to be given a broad and liberal construction.

26. *A. & E.*, pp. 331-332.

But the demand of the Indians would come under the ordinary meaning of the word "claim" as defined by Webster's International Dictionary, which is:

To ask by virtue of right, or *supposed right*.
A demand of a right or *supposed right*.

As also under the definition of "claim" as given in the Universal Dictionary:

To seek for, not as a right or as a due, but as *promised or assured*.

The policy of the government toward actual occupants of public land has been a liberal one, and a grant of public land will not be held to include lands in the actual occupancy and possession of an Indian tribe claiming them as a reservation by agreement with authorized officers of the Government.

26 *A. & E.*, 231-232.

“That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done has been done.”

Leavenworth, etc., v. U. S., 92 U. S., 746.
Mo. Kan. & Texas v. Roberts, 152 U. S. 118.

The Indian agreement imposed upon the United States the obligation to fulfill its terms. It thus was the initiation of a right or claim.

In view of the reasoning and expressions of the Supreme Court in maintaining the rights and claims of settlers similarly situated from an equitable aspect, it would seem likely that the Court would hold that this special right or claim of the Indians would bring these lands within the intent of the exception to the grant to the railroad. Possession under an imperfect or equitable title should be respected and confirmed.

32 Cyc., 1168.
Newhall vs. Sanger, 92 U. S., 761-765.
U. S. vs. So. Pac. R. Co., 76 Fed., 134-136.
U. S. vs. So. Pac. R. Co., 146 U. S., 570-606.

The obligation of the agreement commenced with its execution by the Indian Inspector and the subsequent ratification by the President related back to the date of signature. Under this rule, after the signing of an agreement of cession, the ceding power has no authority to make a grant of land or franchise within the territory ceded.

28 A. & E., 478.
Gibson v. Chouteau, 80 U. S., 101.

THESE LANDS WERE "RESERVED" OR "OTHERWISE APPROPRIATED."

This Reservation was regularly established on August 18, 1877, by one of the recognized methods employed by the Executive Department of the Government.

Indian Reservations are created and their boundaries defined in four different modes:

First. By treaties, *conventions and agreements* with the various tribes.

Transcript of Record pp. 67 and 68.

At the time of the filing of the map of definite location, October 4, 1880, the odd sections in the Spokane Indian Reservation were otherwise appropriated.

The word "appropriated" as defined in Vol. 1, p. 275, of the Universal Dictionary of the English language is:

"To set aside part of what is one's own for a *special purpose*."

Also, in Webster's International Dictionary:

"To set apart for, or assign to a particular person or use, in exclusion to all others."

Wilcox v. McConnell, 38 U. S., 512.

About November, 1877, in pursuance of the agreement, the Indians went upon the lands and occupied the same continuously thereafter as their reservation, without objection by, or interference from, the Government.

Thereafter, the War Department, at the suggestion and request of the Secretary of the Interior, took active measures to prevent any intrusion upon said reservation until the executive order was made.

Such action by the Executive Department of the Government amounted to the withdrawal of said lands from the public domain, and such lands were no longer public lands in the fullest sense of the term so as to fall within the railroad grant.

U. S. v. Carpenter, 111 U. S., 347.

Spalding v. Chandler, 160 U. S., 394-404.

Mo. Kansas & Texas v. Roberts, 152 U. S., 118.

The action of the Department was a withdrawal.

The agreement and order of Inspector Watkins and General Howard took the Indian Reservation out of the public domain.

U. S. v. Carpenter, 111 U. S., 347.

Spaulding v. Chandler, 160 U. S., 394-404.

The action of the Commissioner of Indian Affairs is presumed to be the action of the President, and where the Commissioner ratifies and approves the action of an agent, either before or after it takes effect, his acts are valid and binding upon the Government.

22 Cyc. 142.

The Secretary of the Interior had charge of both land matters and Indian Affairs. This agreement of his duly authorized agent carried with it by necessary implication the duty to withdraw from the public domain the land necessary to carry it into effect; otherwise the purpose of the Indians and the Government could be defeated with the resultant outrage on the rights of the Indians.

Wolcott v. Des Moines Co., 72 U. S., 688.

Inspector Watkins was acting by the special direction of the Commissioner of Indian Affairs and General Howard on behalf of the Secretary of War, at the instance and request of the Secretary of the Interior, as these officials were acting in relation to a subject which appertained to their respective duties, their act, from the beginning, was in legal effect the act of the President.

32 Cyc., 776.

Grisar v. McDowell, 73 U. S., 381.

Wolcott v. Des Moines Co., 72 U. S., 688.

Wolsey v. Chapman, 101 U. S., 768.

OMNIS RATIHABITIO RETROTRAHITUR ET
MANDATO PRIOR AEQUIPARATUR.

:Brown, Max. 757.

Indian Inspector Watkins was authorized to make the agreement with the Indians. But even if he acted in excess of his authority it became binding by subsequent ratification and its validity related back to the time of execution to protect the Indians against any adverse claims which arose in the interim between its date and the confirmation.

Pickering v. Lomax, 145 U. S., 314-315.

A right once attaching to a particular tract, is as effective as a grant in segregating the land from the public domain. The tract cannot be otherwise disposed or by the Government unless the equity is subsequently lost, and on the grant passing, it relates back to the initiation of the right, cutting off all intervening claims.

26 A. & E., 221.

Agreements in the nature of treaties are binding upon the contracting parties, unless otherwise provided in them, from the day they are signed.

U. S. v. Bridleman, 7 Fed., 902.

U. S. v. Martin, 14 Fed., 820.

Davies v. Police Jury, 50 U. S., 289.

22 Cyc., 122.

II. A POLITICAL QUESTION.

The agreement with the Indians by Inspector Watkins, and the action thereon by General Howard, were made for reasons of public policy, in order to protect the Indians and to extinguish their general title to other public lands.

The determination of this very question of public policy was reserved in the granting act to the Railroad Company. It was, therefore, a political question and not within the province of the judiciary.

8 Cyc., 845.

After the Act of March 3, 1871, (Sec. 2079) formal treaties were no longer entered into with the Indians. Since then Indian affairs have been regulated by contracts with the Indian tribes, *practically amounting to treaties*.

16 A. & E., 218.

Indian reservations are created by agreement with the various tribes.

Report 1878, p. LVIII.

32 Cyc., 860.

Where the first incipient steps toward acquiring this reservation had been taken, it created an *inchoate*

title, which it was the duty of the Government to ratify and confirm. This involved some political act of authority and its exercise is not subject to review by the courts.

The political department alone must determine what construction the agreement with the Indians and the acts and representations of its officers shall receive and when the executive departments have asserted powers and rights under the instrument the judiciary cannot deny the construction.

28 *A. & E.*, 488.

The duty of protecting imperfect rights of property under agreements in the nature of treaties, such as the one in question, rests upon the political, and not the judicial, department of Government.

Courts are without jurisdiction to determine or protect such rights.

U. S. v. Sandoval, 167 U. S., 290.

U. S. v. Santa Fe, 165 U. S., 714.

Again,

Where Congress, by subsequent enactments and appropriations, has confirmed the claim of the Indians, its action is to be treated as an adjudication which is not subject to review by the Courts.

32 *Cyc.*, 1211.

Maxwell Land Case, 121 U. S., 366.

The action of the President in establishing the Reservation violated no contract between the Railroad Company and the Government. The Railroad Company at that time had not completed its road opposite

the lands in question, and in the Act of Congress expressly reserved power to "alter, amend or repeal."

U. S. v. Oregon, 176 U. S., 49.

The Act also provided that the right and title of the Indians should be extinguished. Whether the extinguishment of this Indian title was consistent with the welfare of the Indians could only be determined by Congress or the Executive Department.

A. P. R. R. v. Mingus, 165 U. S., 437.

III. DECISION OF THE LAND OFFICE FINAL.

In the officers of the Interior Department was vested the judgment and discretion of determining whether the lands applied for were public lands, or whether they were Indian lands, or whether, for any other reason, they were not free from right or claims, and the determination of this question, being one of fact, the decision will not be interfered with by the Courts.

32 Cyc. 1020, 1025.

26 *A. & E. Enc.*, 388.

Love v. Flahive, 205 U. S., 201.

Sullivan v. Damom, 202 Fed., 285.

Where a mixed question of law and fact is involved, the decision of the land department is conclusive:

26 *A. & E.*, 399.

32 Cyc., 1022.

Marquez v. Frisbie, 101 U. S., 473.

Hartwell v. Havinghorst, 196 U. S., 635.

Whitcomb v. White, 214 U. S., 15.

Ross v. Day, 232 U. S., 117.

Logan v. Davis, 233 U. S., 623.

IV. ESTOPPEL.

The Northern Pacific Railroad Company, with actual or constructive knowledge of the facts, by its conduct led the Government and the Indians to believe that it acquiesced in the agreement whereby the Indians should receive this reservation and abandon their Indian title to other lands claimed by the company under its grant.

After the Indians have gone upon the reservation in reliance upon the promise that it was set aside to them and the company has acquired title to the other lands in which the Indians, at the time of the agreement had perpetual right of occupancy, the corporation is estopped from now claiming, to the prejudice of the Indians, that the agreement was ineffectual to except the land from the grant to the Railroad Company.

16 Cyc. 792.

ARGUMENT.

It is notorious as an historical fact, as also abundantly appears from the record in this case, that great pressure had to be brought to bear upon these Indians to effect their removal to the reservation, and the agreement was evidently and purposely executed, not any more to secure to the Indians the rights for which they stipulated, as to effectuate the policy of the United States in regard to removing them to reservations and extinguishing their general right of occupancy to other lands.

By this agreement with Inspector Watkins, and their removal to the reservtaion in pursuance thereof, their Indian title of occupancy was extinguished in vast areas of lands in Eastern Washington, and thereby immediate title thereto was acquired by the railroad company on completion of its road.

After this corporation has for more than a quarter of a century enjoyed the benefits of the rights which the Indians yielded up under these agreements, it now would ask the Court to say that these Indians not only deprived themselves of the right of occupancy in the lands which they vacated, but by the same token dispossessed themselves of any right in the lands they were to receive as a reservation.

Such a decision would mean nothing less than that by the conduct and representations of the authorized officials of the Executive Departments of the Government, the Indians were buncoed into believing that they were being granted a reservation in which they and their children should be secure from encroachment, while in fact they were giving up their rights, but getting nothing.

The brutal logic of plaintiff's position that by reason of alleged technical defects these reservation lands are not excepted from the grant, if upheld, will, when the twenty-five year trust period has expired, deprive all these Indians who have taken allotments on the odd sections of their homes.

"We would hesitate to put the Government in that attitude. It rejects that attitude and accepts a greater responsibility."

The relations between the United States and the Indian Tribes, being those of a superior towards an inferior who is under its care and control, *its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests*, are to be interpreted as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection.

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and these agreements wherein it has been promised: "*There arises the duty of protection, and with it the power.*" This has always been recognized by the Executive and by Congress, and by the Court, whenever the question has arisen."

"The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules."

Choctaw Nation v. U. S., 119 U. S., 28.

U. S. v. Kagama, 118 U. S., 383.

N. P. Ry. Co. v. U. S., 227 U. S., 366.

U. S. v. Winans, 198 U. S., 372.

Jones v. Meehan, 175 U. S., 11.

THE CASE OF NORTHERN PACIFIC RAILWAY COMPANY VS. MITCHELL, 208 Federal, 469, OF NO AUTHORITY HERE.

It is surprising to find that plaintiff's XIIth Assignment of Error is to an expression found in the opinion of the District Court to the effect "that the

special claim of the Indians was not advanced or relied upon in the case of *Northern Pacific Railway Company v. Mitchell*, 208 Federa., 469." And also that so much space should be taken up in the brief in the discussion of that case.

Since the same learned Judge wrote the opinion in both cases, it ordinarily would be presumed that he understood the issues which each case presented for his decision. But, happily, his recollection of the matter is sustained by the very wording of the opinion in the Mitchell case (*supra*), which in its opening paragraph, contains the following definite statement of the issue:

It is conceded that the plaintiff is the owner in fee of the land, and is entitled to recover unless the land was *reserved* when its predecessor in interest filed the map of definite location of its road, opposite this land, in the office of the Commissioner of the General Land Office, on the 4th day of October, 1880.

Admittedly, as the opinion of the Court here points out, but a single question was then presented for decision, i. e.: Was the Watkins' agreement, the Howard order, or the President's Proclamation, any one or all, singly or collectively, sufficient to create a Reservation antedating the filing of the map of definite location? "It was purely a question of a legal Reservation and in that case no sequence between the events resulting in the signing or issuing of the various documents was shown. The express direction to Inspector Watkins to act did not appear. The co-operation between the War Department and the De-

partment of the Interior with the knowledge of the President and Congress and their ratification of all these acts were not brought to the Court's attention. Indeed, the evidence so entirely failed to reveal this cooperation between the various Departments and the President that the Court in the Mitchell case was moved to suggest that the action of General Howard was "a plain encroachment on the prerogatives of another Department."

In these essentials the case now before the Court is very different and the connection between the Heads of the different Department working together to secure these lands as an Indian Reservation now clearly appears and if it were necessary to decide the case upon that point alone the Court would not follow the Mitchell decision but would be constrained to hold that the Proclamation of the President had relation back to the Watkins' Agreement which was made by the direction of the Commissioner of Indian Affairs, whose acts are in law presumed to be the acts of the President, thus antedating the filing of the map of definite location.

Nor does the lower Court anywhere suggest, as is more than once insinuated in appellant's brief, that it remained of the opinion "that these acts did not operate to reserve the lands." Indeed, to the contrary, and the opinion even went so far as to strongly intimate that the Government might set apart "as an Indian Reservation any lands to which the Indian title had not been extinguished, even after the map of definite location had been filed." (Tr. 38).

That this theory is not a mere idle fancy of the trial Judge is indicated by expressions found in the opinions of the Supreme Court, from only one of which we quote:

The United States did not agree to extinguish the Indian title absolutely, but only 'as rapidly as may be consistent with public policy and the welfare of the Indian, and only by their voluntary session.' Whether an extinguishment of an Indian title at all was consistent with public policy and the welfare of the Indians can only be determined by Congress or the Executive officers of the Government; whether it could be obtained by voluntary session can only be determined by the acts of the Indians themselves. * * * The Railroad Company took its chances with the Government in this particular. The later might not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their session. Under neither contingency would the company have the right to complain.

A. & P. Rd. v. Mingus, 165 U. S., 437, 439.

LIKE THE MITCHELL CASE, THE OTHER
CASES RELIED UPON BY PLAINTIFF
APPEAR TO HAVE BEEN OVER-
RULED, OR NOT IN POINT.

In *Tarpey v. Madson*, 178 U. S., 215, the Court was construing the grant to the Central Pacific Railway Company, wherein the grant was of lands "not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have *attached*, at the time the line of said road is definitely fixed."

And in the course of that opinion the following language is quoted:

“‘Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated.’”

But even in this case it would appear that if the facts had shown that Olney had occupied the land prior to the filing of the map of definite location, *with the intent to acquire title*, the decision might have been otherwise, as the following language of the opinion indicates:

“It is true that there was then no local land office in which those seeking to make preemption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that Court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. In many States the statutory provision in respect to suits is that the defendant, on receiving service of summons, must within a certain time file his answer in the office of the clerk of the court. It cannot be doubted, that if, before he is thus called upon to file his answer the office is burned, and the clerk dies, and there is no place or individual at which or with whom his answer can be filed, such accident or omission will not

defeat his right to make a defense, or give to the plaintiff a right to take judgment by default. Where the accident or omission is not the fault of the party but of the Government, or some official of the government, such accident or omission cannot defeat the right of the individual, and in all that is said in respect to this by the Supreme Court of the State of Utah we fully agree. If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights. But when the office was opened he filed his declaratory statement, and in that he did not suggest that he had been in the occupation of the premises prior to October 20, 1868, but declared that on the 23d of April, 1869, he settled and improved the tract. Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or preemption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States."

As stated in the quotation, there was nothing to show that the settler on this land was occupying it with intent to acquire title. Very different is the case at bar, where the Indians settled on the lands with the intention of acquiring them as their reservation.

So the case of *Whitney v. Taylor*, 158 U. S., 85, also involves land within the grant of the Central Pacific Railway Company, and the distinction in construction is pointed out in the opinion on page 94:

Further, it may be noticed that the granting clause of the Pacific railroad acts differing from similar clauses in other railroad grants, excepts lands to which preemption or homestead "claims" have attached, instead of simply cases of preemption or homestead "rights."

In this case the language first above given from *Tarpey vs. Madsen*, enlarging on the word "attached," is also quoted with approval; nevertheless, it was decided that the tract in question was excepted from the operation of the grant.

Nor can the case of *N. P. R. R. Co. vs. Colburn*, 164 U. S., 383-386, cited by plaintiff, be correctly applied to the case at bar. As pointed out in *Nelson vs. Northern Pacific*, 188 U. S., 132, the land there claimed by it to have been occupied "at the date of definite location was *surveyed* public land, and the good faith of the occupation was not manifest by an entry, or an attempt at entry at any time in the local land office."

In the case at bar, the good faith of these Indians has not been questioned and the land when first occupied by them as a reservation was unsurveyed and was so still when the proclamation of the President was made; and, therefore, it is described in that order by natural objects and not by metes and bounds.

The action of the officials of the Interior and War Departments in securing from General Howard this description by natural objects to be used in the Executive Proclamation shows the "concurrence and approval of the Secretary of War and the Secretary of the Interior," which plaintiff seems to challenge, but which is perfectly apparent from the record.

General Howard sent his telegram to the War Department August 31st, 1880. (Tr. p. 80).

It was transmitted from the War Department with a letter to the Secretary of the Interior September 1, 1880. (Tr. pp. 79-80).

General Howard issued his Field Order No. 8, protecting the land from settlement, on September 3, 1880.

This Order was transmitted by letter to Colonel Wheaton on September 5, 1880. (Tr. p. 79).

In this letter transmitting this Order, occurs the following statement:

"The Secretary of the Interior has asked our cooperation and expressed himself as grateful for promised aid."

On September 7, 1880, the Secretary of the Interior wrote to the Secretary of War, requesting "That General Howard be instructed to forward a description by natural objects of the tract of country which he desired reserved for the protection of said Indians." (Tr. pp. 82-83).

This description—the map (Tr. p. 84) was forwarded by General Howard and transmitted by the Secretary of War to the Secretary of the Interior January 15, 1881.

Within three days thereafter the Executive Order declaring the reservation is proclaimed. (Tr. p. 88).

Still plaintiff questions the concurrent action of the Executive Departments. "There are none so blind as those who *will* not see."

But to return to the case of *Northern Pacific Railroad Company vs. Colburn*. In that case the language of the granting Act seems not to have been closely scrutinized, and it was apparently assumed that the terms were the same as in other Pacific railroad grants, and required the claim to attach to the land by an entry in the land office. This is shown by the words of the opinion, "but frequent decisions of this Court have been to the effect that no pre-emption or homestead claim attached to a tract until an entry in the land office," and then goes on to quote from the *Dunmeyer* case the language heretofore given that "of all the words in the English language, this word 'attach' was probably the best that could have been used," etc. Thus the word *attached* is stressed in the opinion, while it nowhere occurs in the granting Act of the Northern Pacific Railroad.

This decision in the *Colburn* case, as was observed in the dissenting opinion, is "put one side" by the later case of *Nelson vs. Northern Pacific Railway Company*, 188 U. S., 108.

Ib. p. 119: "*The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed.*"

Ib. p. 123: "If it be said that Nelson's claim was that of mere occupancy unattended by formal entry or application for the land, the answer is that that was a condition of things for which

he was not in anywise responsible, and his rights in law were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal record of entry until such survey."

Ib. p. 130: "Being in possession of the land in question at the date of the definite location of the road, with valuable improvements thereon and duly qualified to assert a right thereto under the settlement laws, he had such a right to the land as served to defeat the grant."

To show that the Court deliberately disregarded the Colburn case, the following is quoted from the dissenting opinion:

"At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to anybody that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this Court unanimously held in *Northern Pacific Railroad v. Colburn*, 164 U. S., 383, that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the Court to reconsider its decision, which application was denied

without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put one side by the assertion that the land there in controversy had been surveyed while in this it had not been."

This Nelson case is cited with approval by this Court in *Trodick vs. Northern Pacific Railway Company*, 164 Fed., 916, where the decision was against the claim of the Railroad Company, and which case was affirmed in *Northern Pacific Railway Company v. Trodick*, 221 U. S., 208, the reasoning of which case fully sustains the claims and rights of the Indians in the case at bar. Plaintiff captiously criticises the Court below for quoting in its opinion pertinent paragraphs from the language of the decisions of this Court and the Supreme Court as to what constitutes "public lands" within the meaning of the Act in question, and finds fault because the cases dealt with the question as of the date of the grant rather than that of the filing of the map of definite location. We submit that no flaw in the reasoning of the Court is pointed out, but if it is more satisfying to plaintiff, we trust it will be noted that the Nelson case and the Trodick case, *supra*, were both "concerned with the question of exceptions from a railroad grant."

Further, the Court will not fail to notice that all the cases cited by plaintiff involve homestead or preemption claims, but the exception in the Act is

not restricted to such alone, but in express terms refers to "other claims or rights."

The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed."

THE LANDS "WERE RESERVED."

This reservation was established as the result of a convention and by agreement with the Indians on August 18, 1877. The manner in which it was done was in keeping with a recognized method of procedure, which at the time obtained in the Department of the Interior.

In referring to this very question the report of the Commissioner of Indian Affairs for 1878, at page 58 (Tr. 67-68), says:

Indian Reservations are created and their boundaries defined in four different modes:

First: By * * * conventions and agreements with the various tribes.

Furthermore, Inspector Watkins was, by letter of May 7, 1877, particularly directed by the Commissioner of Indian Affairs to gather these Indians upon permanent reservations and in securing results to act with General Howard. (Tp. p. 69).

The cooperation of the Department of the Interior and the War Department is shown throughout the negotiations which resulted in the agreement with the Spokane Indians of August 18, 1877, in their

being placed upon the reservation in November, 1877, and in their being continuously thereafter protected in the possession thereof until the proclamation of the President. (Tp. pp. 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83).

The action of the Commissioner of Indian Affairs is presumed to be the action of the President, and where the Commissioner ratifies and approves the action of an agent, either before or after it takes effect, his acts are valid, and binding on the Government.

22 Cyc., 142.

The action of the Secretary of the Interior and the Secretary of War was in legal effect the establishment of a reservation.

32 Cyc., 776.

The evidence introduced at the trial establishes that these Indians had gone upon the reservation in pursuance of the agreement and that in 1879, long prior to the filing of the map of definite location, the said Indians were actually residing on said lands, and had made valuable improvements thereon and were cultivating the same and occupying and claiming them as their reservation. (Tp. pp. 64, 65, 66, 67, 92, 93).

The following excerpts from the opinion of Mr. Justice White, now Chief Justice, rendered in the case of *Spalding v. Chandler*, 160 U. S., at p. 404, are particularly appropos:

“* * * whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making

of the treaty and acquiesced in by the United States government or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. The clear duty rested upon the government to see that a tract was reserved for the purposes designated in the treaty. *United States v. Carpenter*, 111 U. S., 347-349."

"The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."

"Private rights could not, without the authority of Congress, be acquired in the tract during the occupancy of the reservation under the treaty, *for the lands in question lost their character as public lands in being set apart or occupied under the treaty*, and became exempt from sale and preemption. *Missouri, Kansas & Texas Railway v. Roberts*, 152 U. S., 114, 116, 118." (Italics inserted).

THE LANDS WERE "OTHERWISE APPROPRIATED."

It is urged that these lands were not reserved by "competent authority." We think otherwise.

But beyond the significance of the word "reserved" alone, there are other words in the Act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and at the time of filing of the map of definite location these lands were appropriated to the use of the Indians, and were occupied by them. Even though

it were not a final appropriation, it was sufficient to except it from the grant.

N. P. v. Musser, 168 U. S., 608.

Mo. Kansas, etc., R. vs. Roberts, 152 U. S., 114.

Spalding vs. Chandler, 160 U. S., 404.

The action of the Department officials and of the Indians amounted to an appropriation of the lands to a special purpose, being at least such a segregation and withdrawal of said tract from settlement and from the public domain that it was no longer "public land" in that fullest sense of the term required to bring it under the grant.

The action of the War Department, cooperating with the Interior Department by invitation, in directing the armed forces of the Government to prevent intrusion or settlement upon these lands claimed by the Indians, we submit was a more effective segregation and withdrawal of it from the public domain than the mere filing of a notice or order in the Land Office could have been.

If there is no doubt that such notice or order would accomplish the purpose, why in reason should the more notorious and powerful protection of these lands against intrusion by the army be held impotent.

By the action taken, these lands were withdrawn from private entry or appropriation until further action should be taken.

U. S. v. Carpenter, 111 U. S., 347.

"The intent of Congress in all railroad land grants, as has been understod and declared by this Court again and again, is that such grant shall operate

at a fixed time, and *shall take only such lands as at that time are public lands.*"

U. S. So. Pac. R. R., 146 U. S., 570.

N. P. R. R. v. Musser L. Co., 168 U. S., 604.

Northern Lumber Co. v. O'Brien, 204 U. S., 199.

"Every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indians or for other purposes.

This reservation was reserved by an agreement with the Indians. To afterwards transfer the odd sections therein to the Northern Pacific would "involve a gross breach of the public faith." The presumption is conclusive that Congress never meant that lands thus encumbered should pass by the grant.

Congress cannot be supposed to have intended to include land appropriated to another purpose.

This Act discloses no intention to change the long continued practice with respect to tracts set apart for the use of the government or of the Indians.

"If, on examination, there are doubts about the intention or intent of the grant, the government is to receive the benefit of them."

To consider what is excepted, will serve to fix more definitely what is granted. All land "reserved" or "otherwise appropriated" at the time of the filing of the map of definite location are excluded from the grant. The language is broad and comprehensive and unquestionably covers these lands.

Speaking of a similar grant, the Court, in *Leavenworth, etc., R. R. Co. v. U. S.*, 92 U. S., 746, said:

It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. *The lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done, has been done.* (Italics inserted).

THESE LANDS WERE NOT "FREE FROM CLAIMS OR RIGHTS."

In this Act occur other words of exception. The land to pass by the grant must be "free from preemption and other claims or rights." Certainly, after the action taken by the agents of the Interior and War Departments, subsequently ratified by the President of the United States and Congress and the occupation of the lands as a de facto reservation by the Indians, it cannot be said that the premises were "free from rights or other claims."

We believe that on the undisputed facts in this case and the law applicable thereto, the rights of these Indians to this reservation are firmly established.

But the language is not simply "free from rights," but "free from claims." Surely the Indians had an existing claim. No one can read all the words of the description which express the exceptions, without

being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term.

That these Indians had a special claim to these lands is too plain to require argument. It was recognized by the Proclamation of the President and ratified by various acts of Congress (Transcript p. 88); it was upheld against the strenuous opposition of the plaintiff by the decision of the Secretary of the Interior (Transcript p. 61). It cannot be questioned now.

A claim as defined by Webster is: "A demand of a right or *supposed right*." To except these lands from the grant not even an *equitable claim* was required, only the demand of a *supposed right*.

Surely, no one will say that the Indians who, in compliance with the agreement and solemn assurance of Watkins, the duly authorized representative of the President, had gone on these lands as a reservation and claimed them as such ever since November, 1877, were not insisting on a *supposed right*, different from their general right of occupancy. It must be conceded that theirs was an *equitable claim*. If so, as said in the 26th *A. & E. Encyclopaedia*, p. 221:

The right to acquire land once attached to a public tract is as effective as a grant to segregate the land from the public domain. The tract cannot be otherwise disposed of by the Government, unless the equity is lost. * * * And on the grant passing, it relates back to the initiation of the right, cutting off all intervening claims.

The decisions of the Courts go even further and say that not "a valid claim" nor "an equitable claim" is necessary—only just "a claim." Even an unlawful claim is enough to except it from plaintiff's grant.

In construing this word "claim" in grants similar to the one under consideration, the Supreme Court of the United States has held:

It was not the intention of Congress to open a controversy between the claimant and the Railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of the validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard.

United States v. So. Pac. Rd., 146 U. S., 570, 606.

This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be lawful, but submitted them all for adjudication.

Newhall vs. Sanger, 92 U. S., 761, 765.

Likewise, Judge Ross, in *United States vs. Southern Pacific Railroad Company*, 76 Fed., 136, said:

Whether or not valid is immaterial to the question here; for, as has been often decided by the Supreme Court, it is not the validity of such claim, but the fact that it exists at the time of the definite location of the railroad, that excluded the lands in controversy from the category of "public lands," to which alone the company's

grant attached. * * * This view is conclusive as against the contention of the defendant railroad company."

And equally conclusive against the plaintiff railroad company in the case at bar.

The opinion of the lower Court in the case at bar furnishes apt language:

FOR A CONCLUSION.

"In the light of the foregoing decisions it seems manifest that the Spokane Tribe of Indians had a special claim to the lands embraced in this reservation at the time of the definite location of the railroad such as would except them from the operation of the grant to the company. Whether that claim was a valid one, enforceable against the United States, we need not enquire. It is sufficient that the claim existed. The lands had been set apart for the use of the Indians by both the civil and military authorities of the Government; the officers of the Government represented to the Indians that they came among them for the purpose of establishing a reservation, armed with authority from the Secretary of the Interior and the President of the United States; the Indians relied upon these representations, moved onto the reservation, established homes there, and relinquished their more general claim to other public lands in the vicinity. After all this had transpired the Government was bound, in equity and good conscience, to recognize the claim of the

Indians and confirm the acts of its officers and did so at an early opportunity by public proclamation of the President. It is idle, now, to enquire whether these officers had technical authority under the law to establish a reservation. The parties were not dealing on an equal footing. A powerful Government was treating with an inferior race, and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders.

“If the lands were excepted from the operation of the grant at the date of definite location, by reason of the claim of the Indians, they were excepted for all purposes and for all time.”

We respectfully submit that the decision of the District Court should be affirmed.

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for Defendant in Error.

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